(18,632.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No 404.

THE GERMAN SAVINGS AND LOAN SOCIETY, PLAINTIFF IN ERROR,

vs.

DORA MAY DORMITZER, WILLIAM L. TULL, AND ERNEST B. TULL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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a In the Supreme Court of the State of Washington.

DORA MAY DORMITZER and WILLIAM L. TULL, Plaintiffs and Appellants,
v.
THE GERMAN SAVINGS AND LOAN SOCIETY, Respondent; Ernest B. Tull, Defendant and Appellant. } No. 3528.

Nash & Nash, William M. Murray, Lewis & Lewis, attorneys for appellants.

Happy & Hindman, Struve, Allen, Hughes & McMicken, attorneys for respondent.

[Seal of the Supreme Court, State of Washington.]

b THE STATE OF WASHINGTON, } *ss:*
County of Spokane, }

In the Matter of DORA MAY DORMITZER ET AL. *vs.* GERMAN SAVINGS & LOAN SOCIETY ET AL. 11816.

Certificate.

—, James A. Drain, clerk of the superior court of the State of Washington, for the county of Spokane, do hereby certify that the above and foregoing is a true and correct copy of the transcript on appeal in the above-entitled estate, as the same now appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 16th day of December, 1899.

JAMES A. DRAIN, *Clerk,*
By F. L. TITSWORTH, *Deputy.*

DORA MAY DORMITZER ET AL.
vs.
GERMAN SAVING- & LOAN SOCIETY ET AL. } No. 11816.

OLYMPIA, WASH.

Received from clerk of superior court of Spokane county the following transcript on appeal in the above-entitled case.

——, ——,
Clerk of Supreme Court.

c [Endorsed:] No. 3528. Filed Feb. 19, 1900. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

1 STATE OF WASHINGTON, *County of Spokane,* } ss:

In the Superior Court.

DORA MAY DORMITZER and WILLIAM L. TULL, Plaintiffs,
vs.
THE GERMAN SAVINGS & LOAN SOCIETY, a Corporation; F. M. TULL, P. D Tull, Individually and as Guardian; Exchange National Bank, a Corporation; Spokane Falls Gas Light Company, a Corporation; Ernest B. Tull, and J. Grant Hinkle, Defendants.

The above-named plaintiffs, Dora May Dormitzer and William L. Tull, complain of the above-named defendants, and for a first cause of action, allege:—

1. That the above-named defendant, The German Savings & Loan Society, is now and was at all the times mentioned herein, a corporation, duly organized and existing under the laws of the State of California.

2. That the said defendant The Exchange National Bank, is now and was at all the times hereinafter mentioned, a corporation duly organized and existing under the banking laws of the United States of America, doing business in the city of Spokane, State of Washington.

3. That said Spokane Falls Gas Light Company is a corporation organized and existing under the laws of the State of Washington, doing business in the city of Spokane, Washington.

4. That the plaintiff, Dora May Dormitzer, is the daughter, and the plaintiff William L. Tull and the defendant Ernest B. Tull are the sons of the defendant F. M. Tull.

5. That on or about the 3rd day of July, 1888, the defendant P. D. Tull, petitioner the probate court of Spokane county, Washington Territory, to be appointed guardian, of the persons and
2 estates of the plaintiffs and the defendant Ernest B. Tull, and that on the 24th day of July, 1888, Millard T. Hartson, probate judge, of said court, made an order appointing said P. D. Tull guardian of the persons and estates of the said plaintiff and the said defendant; that on the 24th day of July, 1888, letters of guardianship were issued to said P. D. Tull and he thereupon assumed the duties as guardian of said plaintiffs and their brother, and has ever since continued to act as their guardian; that at the time of the appointment of said defendant as guardian aforesaid, Dora May (Tull) Dormitzer, William L. Tull and Ernest B. Tull, were of the ages respectively of ten, fourteen and five years; that at said time, the plaintiff Dora May Dormitzer was named Dora May Tull and she and her said brothers resided with their father the defendant F. M. Tull; that P. D. Tull is the brother of F. M. Tull and the uncle of the plaintiffs and their said brother.

6. That on the 1st day of March, 1889, at the city of Spokane Washington, the defendant F. M. Tull made executed and delivered to the defendant P. D. Tull as guardian aforesaid of Dora May Tull,

William L. Tull and Ernest B. Tull, his certain promissory note in writing, for the sum of fourteen thousand dollars ($14,000) gold coin of the United States of America, dated March 1st 1889, payable five years from date and drawing interest at the rate of ten (10), per cent. per annum from date until paid.

7. To secure the payment of said note, said defendant, F. M. Tull, on the 1st day of March, 1889, executed and delivered to the defendant P. D. Tull as guardian of William L. Tull, Dora May Tull and Ernest B. Tull, his certain indenture of mortgage, which is in words and figures following to wit:

"This indenture, made this 1st day of March, in the year of our Lord one thousand eight hundred and eighty-nine, between F. M. Tull widower, of Spokane Falls Washington Territory, the party of the first part, and P. D. Tull as guardian of William L. Tull, Ernest B. Tull, minors, the party of the second part.

Witnesseth: That the party of the first part, for and in
3 consideration of the sum of fourteen thousand dollars, gold coin of the United States, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to his successors, the following-described tract or parcel of land lying and being in the county of Spokane, and Territory of Washington, and particularly bounded and described as follows, to wit: Commencing at the northwest corner of block nineteen, (19) in Resurvey addition to the town of Spokane Falls, thence southwardly along the east line of Stevens street ninety-nine $\frac{42}{100}$ feet; thence at right angles eastwardly and parallel with the south line of Stevens street northwardly to south line of Riverside avenue; thence west along said south line of Riverside avenue to place of beginning. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging.

This conveyance is intended as a mortgage to secure the payment of fourteen thousand dollars, gold coin of the United States, together with interest thereon, in like gold coin, at the rate of ten per cent. per annum from date until paid, according to the terms and conditions of one certain promissory note bearing even date herewith, made by F. M. Tull payable to P. D. Tull guardian of Wm. L. Tull, Dora May Tull and Ernest B. Tull, minors, and these presents shall be void if such payment be made according to the terms of and conditions thereof. But in case — be made in the payment of the principle or interest of said promissory note, or any part thereof, when the same shall become due and payable according to the terms and conditions thereof, then said party of the second part, and his successors, are hereby empowered to sell the said premises, with all and every of the appurtenances, any or part thereof, in the manner prescribed by law; and out of the money arising from such sale to retain the whole of said principal and interest, whether the same shall then be due or not, together with the costs

and charges of making such sale, and the surplus,
4 if any there be, shall be paid by the party making such sale on demand to the said party of the first part, his heirs or assigns; and in any suit or other proceeding that may be had for the recovery of the said principal and interest on either said note or said mortgage, it shall and may be lawful, for the said party of the second part, or his successors, to include in the judgment that may be recovered, counsel fees and charges of attorneys and counsel employed in such foreclosure suit, the sum of five hundred dollars, ($500.00), in gold coin; or in case of settlement or payment being made after suit has been commenced, and before the final decree has been entered thereon, an attorney's fee of five hundred dollars in gold coin, shall be taxed as a part of the costs in such suit, as well as all payments that the said party of the second part, his successors, may be pledged to make for him, or their security by insurance, or on account of any taxes, charges, incumbrances or assessments whatsoever on the said premises, or any part thereof.

In witness whereof the said party of the first part has hereunto set his hand and seal this day and year first above written.

(Signed) F. M. TULL. [SEAL.]

Signed, sealed and delivered in the presence of—
H. E. HOUGHTON.
W. C. JONES.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

I, Horace E. Houghton, a notary public in and for said county and Territory, do hereby certify that on this sixth day of March, 1889, personally appeared before me the within-named F. M. Tull, a widower, known to me to be the person described in, and who executed the within mortgage and acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and seal this 6th day of March, A. D. 1889.

(Signed) HORACE E. HOUGHTON,
[SEAL.] *Notary Public, Washington Territory.*

5 That on March 8th, 1889, said mortgage was filed for record in the auditor's office of Spokane county, State of Washington, and the same was thereafter duly recorded on March 23rd 1889, in Book "U" of Mortgages of said county at page 410.

6 9. That thereafter to wit: on the 7th day of September, 1889, said P. D. Tull as guardian as aforesaid, executed a release in writing of the mortgage above set forth and described, together with the debt thereby secured, to wit: said promissory note made and executed by F. M. Tull for $14,000.00; which said release and satisfaction piece is in words and figures, following to wit:

Know all men by these presents: That I P. D. Tull as guardian of W. L. Tull, Dora May Tull and Ernest B. Tull, minors, do hereby

certify that a certain mortgage bearing date March 1st, 1889, made and executed by F. M. Tull, party of the first part herein, to me as such guardian, party of the second part, herein and therein, for the sum of fourteen thousand dollars, secured upon the following-described property situate in Spokane county. Commencing at the northwest corner of block 19 in resurvey and addition to the town of Spokane Falls; thence southerly along the east line of Stevens street ninety-nine $\frac{42}{100}$ feet; thence at right angles eastwardly and parallel with the south line of Riverside avenue one hundred feet (100); thence at right angles parallel with the east line of Stevens street northwardly to south of Riverside avenue; thence west along said south line of Riverside avenue to place of beginning, and recorded in the office of the auditor of Spokane, Washington, in Book "U" of Mortgages of said county on page 410 on the 23rd day of March, 1889, together with the debt thereby secured, is fully paid and discharged.

In witness whereof I have hereunto set my hand and seal this 7th day of September, 1889.

(Signed) P. D. TULL. [SEAL.]

Witness-:
H. E. HOUGHTON.
W. C. JONES.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

This certifies that on this 7th day of September, A. D. 1889, before me the undersigned a notary public in and for said county and Territory, personally appeared the within-named P. D. Tull guardian of W. L. Tull, Dora May Tull, and Ernest B.
7 Tull minors, personally known to me to be the individual described in and who executed the within-instrument and acknowledge- that he signed and sealed the same as guardian of said minors as his free and voluntary act and deed for the uses and purposes therein mentioned. In testimony whereof I have hereunto set my hand and seal the day and year in this certificate above written.

W. C. JONES,
[SEAL.] *Notary Public.*

Filed September 11th, 1889, 10.50 a. m. Request Tull & Hobbs.
Recorded September 18th, 1889.

M. D. SMITH, *Auditor,*
By L. WILSON, *Deputy.*

10. That on September 11th, 1889, said release was filed in the said auditor's office and was thereafter duly recorded on September 18th, 1889.

11. That said release was executed by said P. D. Tull as guardian without any order or judgment of the court authorizing or allowing him to execute the same; that at the time of the execution of the

said release said P. D. Tull was acting as guardian of the plaintiffs and their brother; that the execution of the said release was never brought to the attention or knowledge of the court which then had jurisdiction of the persons and property of these plaintiffs and defendant Ernest B. Tull.

That said release was executed without the payment, discharge or satisfaction of the debt secured thereby and the same is now and always has been unpaid undischarged and unsatisfied.

That on the margin of said mortgage in the records of the said county auditor is an indorsement of the discharge of said mortgage, that said purported satisfaction of said mortgage and the said indorsement on the record thereof in said auditor's office is and was wholly invalid and void and of no force and effect; that said mortgage is now, and at all the times since the 1st day of March, 1889, has been in full force and effect upon the said real estate contained and described herein; that neither said note nor mortgage nor any part of the principal sum therein mentioned, nor of the interest thereon, has ever been paid and said mortgage has never
8 been paid nor satisfied nor discharged; that said release was executed by said P. D. Tull as guardian as aforesaid, in violation of law and contrary to the statutes in such cases made and provided and without the order of the court which had jurisdiction of the matter.

12. That said invalid release and marginal satisfaction executed by said guardian as aforesaid was made pursuant to a conspiracy made and entered into by the defendants F. M. Tull and P. D. Tull and the German Savings & Loan Society some time in the year 1888, with the fraudulent purpose and intent, among others, of cheating and defrauding these plaintiffs and their brother.

That on the 18th day of July, 1888, these plaintiffs and the defendant Ernest B. Tull, were the owners and were seized in fee-simple of the following-described real property situate in Spokane county, Washington, to wit:

An undivided one-half interest in and to that certain piece of real estate, commencing at the northwest corner of block 19, in the city of Spokane Falls and running thence in a southerly direction along the east line of Stevens street 99.42 feet, thence at right angles in an easterly direction parallel with the south line of Riverside avenue 100 feet thence at right angles parallel with the east line of Stevens street in a northerly direction to the south line of said Riverside avenue and thence in a westerly direction along the last-named line to place of commencement; which is the same property described in the mortgage made by F. M. Tull to P. D. Tull as guardian as aforesaid, and is set forth hereinabove. That said P. D. Tull and F. M. Tull then and there conspiring together and for the purpose of cheating and defrauding these plaintiffs and their said brother out of their interest in said described real estate, procured the defendant P. D. Tull to be appointed guardian as aforesaid; that P. D. Tull as such guardian, pursuant to the said conspiracy and fraudulent purpose set forth herein, and made and entered into with
9 F. M. Tull, filed a petition on the 1st day of August, 1888, in the proceeding wherein he had been appointed guardian as

aforesaid to wit:—the proceeding on file in the court entitled "In the matter of the guardianship of W. L. Tull *et al.*," and numbered 219 of the causes in probate cases.

That in said petition said P. D. Tull alleged among other things, that it would be beneficial to the plaintiffs and their brother, to sell their interests in the real estate described above; that all of said averments in said petition were false and untrue and the same was a part and parcel of the conspiracy to cheat and defraud plaintiffs out of their said property.

13. That pursuant to said petition and influenced thereby and acting upon the same the probate court of Spokane county, ordered and directed the defendant P. D. Tull as guardian to sell said property for cash to the highest bidder at public sale.

That upon the hearing of said petition said probate court entered a decree in said guardianship proceedings, on the 3rd day of Sept. 1888, directing said guardian to sell said property as aforesaid, all of which more fully appears by a reference to said proceedings. Thereupon, as the records in said case show, said P. D. Tull as guardian on the 26th day of November, 1888, reported to said court that he had sold the herein-described real estate of these plaintiffs and their brother to their father, the defendant F. M. Tull and that said F. M. Tull was the highest and best bidder at said sale, and that said bid was for $14,000.00 cash.

That P. D. Tull as guardian officially reported said sale to said court and filed his report thereof on the 26th day of November, 1888, in said guardianship proceedings.

14. That on the 27th day of November, 1888, upon the motion of P. D. Tull and F. M. Tull, the sale of said real estate was by the said probate court confirmed and said P. D. Tull as guardian was directed to make a conveyance of said above-described real estate to the defendant F. M. Tull.

That said order confirming said sale made by the court aforesaid, was filed in the matter of the guardianship of W. L. Tull *et al.*, case No. 219, on the 27th day of November, 1888.

That defendant P. D. Tull as guardian made executed and delivered to F. M. Tull a guardian's deed purporting to convey thereby to F. M. Tull all the right title and interest of said plaintiffs and their brother in and to said real property herein described.

That said deed executed as aforesaid was filed in the auditor's office of Spokane county, Washington, on the 30th day of Nov., 1888, and was recorded in Book — of Deeds at page —, on Dec. 4th, 1888.

15. That said sale of property reported by P. D. Tull as guardian aforesaid, was not for cash, or for any consideration passing at that time or at the time said deed from P. D. Tull as guardian to F. M. Tull was executed.

That all of the proceedings taken and instituted in said guardianship case, case No. 219 as aforesaid, and the proceedings herein set forth relative to the sale of said property were brought about and instituted by the defendants F. M. and P. D. Tull for the purpose and object among others, of securing to F. M. Tull the whole, entire

and undivided title and interest in and to said real estate and for the purpose of cheating and defrauding plaintiffs and Ernest B. Tull.

That F. M. Tull was in truth and in fact the guardian of plaintiffs and Ernest B. Tull and the appointment of P. D. Tull as such guardian was procured by F. M. Tull with the intent and purpose in view of securing unto himself the undivided title of said property:

That all the proceedings and steps taken in case No. 219 as aforesaid were cunningly devised and conceived by the said F. M. and P. D. Tull and the purpose and object of said proceeding was to secure for F. M. Tull the whole title of said property so that said Tull might mortgage the same to the defendant The German Savings & Loan Society for his sole benefit and advantage and to cheat and defraud his children.

11 16. That the alleged purchase price and purported consideration paid by said defendant F. M. Tull to P. D. Tull as guardian for said plaintiffs and their brother's interests in said real estate, to wit: $14,000.00 was grossly inadequate; that at the date of said transaction plaintiffs' and their brother's interests in said property was worth the sum of $35,000.00 and upwards.

17. That twenty days after said guardian's deed was filed as aforesaid, pursuant to his fraudulent intent and purpose, to wit: to secure said property for himself and to mortgage the same for his own advantage and benefit and to defraud plaintiffs, said F. M. Tull mortgaged said real estate to the defendant, The German Savings & Loan Society to secure F. M. Tull's promissory note for $40,000.00; said morgage was executed by said Tull on the 6th day of December, 1888, and was filed and was recorded in said auditor's office in Book "S" at page 518, on the 21st day of Jan., 1889.

18. Plaintiffs allege that said mortgage had been negotiated for and its terms and conditions had been fully agreed and determined upon by the defendants F. M. Tull and The German Savings & Loan Society, previous to the institution of said guardianship proceedings, to wit: case No. 219.

19. That prior to the 1st day of August, 1888, the date when P. D. Tull as guardian filed his petition to sell said real estate, the defendant The German Savings & Loan Society knew the condition of said property and all about the title to the same and plaintiffs allege the facts to be that the guardianship proceedings in case No. 219, mentioned herein, were arranged, conceived and all its essentail details were settled and agreed upon by F. M. Tull, P. D. Tull and their attorneys and the German Savings & Loan Society and its attorneys; that the attorneys of these several defendants jointly drew up and indited the various petitions and orders and papers filed in case No. 219.

12 20. Said German Savings & Loan Society knew that at the time of the execution of said guardian's deed and the execution of all the proceedings leading up thereto, that plaintiffs' and their said brother's interests in said property was worth more than $14,000.00 and that the said consideration in said deed was grossly

inadequate and that said plaintiffs and defendant and Ernest B. Tull's interests therein *was* worth the sum of $75,000.00 and upwards; said defendant further knew that the decree authorizing said sale to F. M. Tull of said property was a subtrifuge arranged by F. M. Tull for his own benefit and advantage.

21. That when P. D. Tull as guardian reported said sale of said real estate for cash to F. M. Tull *as* foresaid, said German Savings & Loan Society knew that said report was false and that said sale was not for cash or for anything of value whatsoever; that no money of any kind changed hands between said parties at that time or at any time thereafter and plaintiffs allege that said report was made by said guardian falsely and fraudulently and as a part of the fraudulent purpose of F. M. Tull.

Said order of sale and said guardian's deed were procured in manner aforesaid in order to allow F. M. Tull to mortgage said real estate for his own benefit and advantage to the German Savings & Loan Society for $40,000.00 as plaintiffs have alleged.

That all of said guardianship proceedings herein mentioned were trumpted up and fraudulently conceived by F. M. Tull, P. D. Tull and the German Savings & Loan Society and their attorneys in order to give said proceedings a semblance of propriety and that the German Savings & Loan Society might appear as a *bona fide* purchaser for value and without notice.

22. That after said fraudulent purposes aforesaid of F. M. Tull had been accomplished and he had secured title to said real estate and had negotiated a mortgage loan thereon from the German Savings & Loan Society, P. D. Tull as guardian filed an instrument in said the case No. 219 on the 7th day of March, 1889, two months
13 after said mortgage loan for $40,000.00 had been negotiated, reporting to said probate court that he had invested the proceeds of his said sale of real estate in a note of F. M. Tull's, dated March 1st 1889, and secured by a mortgage on real estate which is the same note and mortgage set forth and described herein in paragraphs numbered 6, 7, 8 & 9 and which said note and mortgage *was* thereafter released and discharged in the manner and form alleged in paragraphs numbered 9, 10, 11, & 12 herein.

That in said report said guardian committed a fraud upon the said court and upon plaintiffs in this, to wit: that said guardian did not state in said report whether said mortgage was a first or second mortgage on the said real estate, when in truth and in fact the same was a second mortgage on said real estate, to wit:—second to the $40,000.00 mortgage thereon held by defendant The German Savings & Loan Society and said defendant The German Savings & Loan Society knew that said guardian perpetrated said fraud upon the court and the plaintiffs.

23. That said $40,000.00 mortgage on said real estate of the German Savings & Loan Society was by that defendant on the 5th day of Nov., 1889, duly released and discharged of record by a proper instrument duly executed by said defendant, pursuant to a resolution of its board of directors, for that purpose; that notwithstanding the due execution of said release and satisfaction piece, there ap-

pears upon the margin of the record wherein said mortgage is recorded in the auditor's office, to wit:—Book "S" at page 518, the words "Irregularly released;" that said words were put on said record without authority of law and for the purpose of cheating and defrauding plaintiffs and defendant Ernest B. Tull; that the German Savings & Loan Society procured said words to be placed on said record for its own benefit and advantage and to injure plaintiffs and — was a part of the fraudulent purpose theretofore entered into with P. D. and F. M. Tull.

14 That said formal release mentioned in this paragraph and executed by the German Savings & Loan Society was filed for record in the office of the auditor for Spokane county on the 11 day of Nov., 1889.

24. That after the $40,000.00 mortgage of the German Savings & Loan Society had been released as aforesaid, said defendant well knowing the fraudulent purposes and intentions of F. M. Tull and in violation of the plaintiffs' rights, continued a course of dealing with F. M. Tull in and about said real estate of the same kind and nature set forth above; that thereafter said F. M. Tull mortgaged the same real estate to the German Savings & Loan Society to secure the promissory note of F. M. Tull for $50,000.00, which said mortgage was executed on the 25th day of October, 1889, and was recorded in the said auditor's office on the 28th day of November, 1889 in Book 39 of Mortgages at page 11.

25. That on the 13th day of May, 1892, said $50,000.00 was duly and regularly released by an instrument duly executed by the German Savings & Loan Society, which said instrument was duly filed in the office of the said county auditor on the 20th day of May, 1892, and was thereafter recorded in Book — at page —.

26. That thereafter to wit:—on the 5th day of May, 1892, defendant F. M. Tull mortgaged the real estate described herein and other real estate, to the German Savings & Loan Society for $100,000.00 which said mortgage was duly recorded in Book 44 of Mortgages at page 101 in said auditor's office; that said mortgage was given to secure F. M. Tull's promissory note for $100,000.00; thereafter said mortgage was foreclosed by the German Savings & Loan Society and that it is under and by virtue of a deed executed in said foreclosure proceedings that said defendant claims title to said real estate.

27. That in the matter of the guardianship of W. L. Tull *et al.*, case No. 219, no proceedings were had and no reports or accounts of any kind or character were made by the said guardian after Dec. 10th 1889.

Plaintiffs allege that in said petition filed in cause No. 219 filed to wit:—on August 1st, 1888, defendant P. D. Tull as guard-

15 ian describes and mentions other real property of the plaintiffs and their brother, than the real estate described herein, and alleges in said petition that said property was mortgaged for $20,000.00; that said averments were a false and untrue, that there were no mortgages on said property and the German Savings & Loan Society knew that fact.

That said property mentioned in connection with the real estate

described herein, in said petition was fraudulently sold and disposed of to the German Savings & Loan Society and which said sale is made the subject of the second cause of action against defendants herein.

That when the order of sale was made in said case No. 219 disposing of said last-mentioned property, to wit:—on Dec. 10th, 1889, no proceedings of any kind were thereafter taken in said case by said guardian; that he is now and always has been in default and has never pretended to account to the court for said real estate or for any of his doings as guardian aforesaid, except to make and file in said case such records and papers as would effectually dispose of his said wards' property.

28. That on the 20th day of Feb., 1894, said Dora M. Tull was legally and lawfully married to Paul C. Dormitzer and they now are husband and wife and she is the same person named as Dora May Dormitzer plaintiff.

29. That at the time of said sale of real estate to F. M. Tull by the said guardian, no appraisers were appointed to appraise said property; that no guardian *ad litem* was appointed to protect the interests of plaintiffs and Ernest B. Tull and that there were no bidders at said sale except F. M. Tull; that the German Savings & Loan Society knew of said facts.

16 30. That the bond executed by the said guardian for the faithful discharge of his said duties as guardian is invalid and void the same being not such a bond as the law requires of guardians; that the sureties thereon are insolvent and that P. D. Tull is unable to respond in damages to the amount of the said note and interest; that the bond required by statute from guardians when making a sale of their wards' real estate and filed therein by P. D. Tull was cancelled and discharged by the court immediately after the said sale of said property; that the sureties thereon are insolvent.

31. That the Exchange National Bank a corporation, the Spokane Falls Gas Light Company a corporation, J. Grant Hinkle each has, or claims to have some interest in, or lien upon, the said mortgaged premises, or some portion thereof, the exact nature of which is to these plaintiffs unknown; but whatever the same may be plaintiffs allege that the claims, liens or interests of each and every of said defendants in, to or upon said mortgaged premises or any portion of the same, are subsequent and inferior to the lien of said mortgage thereon held by plaintiffs and Ernest B. Tull and to plaintiffs' rights and interests in and to said real estate.

32. That the defendant Ernest B. Tull is a minor of tender years, to wit:—of the age of about sixteen years and resides with his father F. M. Tull; that it is for the reasons herein stated that he is made a party defendant in this action.

33. That said plaintiffs had no knowledge or exact information of the alleged frauds set forth herein, and practiced upon them by the above-named defendants until just immediately before this action was commenced.

34. For a second cause of action against the above-named defendant the said plaintiffs Dora May Dormitzer and W. L. Tull allege:—

1. That the above-named defendant The German Savings & Loan Society is now and was at all the times mentioned herein, a corporation, duly organized and existing under the laws of the State of California.

17 2. That said defendant The Exchange National Bank, is now and was at all the times hereinafter mentioned a corporation, duly organized and existing under the banking laws of the United States of America, doing business in the city of Spokane, State of Washington.

3. That said Spokane Falls Gas Light Company is a corporation organized and existing under the laws of the State of Washington, doing business in the city of Spokane, Washington.

4. That the plaintiff Dora May Dormitzer is the daughter, and the plaintiff Wm. L. Tull and the defendant Ernest B. Tull are the sons of the defendant F. M. Tull.

5. That on or about the 3rd day of July, 1888, the defendant P. D. Tull petitioned the probate court of Spokane county, Washington Territory, to be appointed guardian of the persons and the estates of the plaintiffs and the defendant Ernest B. Tull, that on the 24th day of July 1888, Millard T. Hartson, probate judge of said court, made and order appointing said P. D. Tull guardian of the persons and the estates of the said plaintiffs and the said defendant; that on the 24th day of July, 1888, letters of guardianship were issued to P. D. Tull and he thereupon assumed the duties as guardian of said plaintiffs and their brother and has ever since continue- to act as their guardian.

That at the time of the appointment of said defendant as guardian as aforesaid, Dora May (Tull) Dormitzer, William L. Tull and Ernest B. Tull were of the ages respectively of ten, fourteen and five years; that at said time the plaintiff Dora May Dormitzer was named Dora May Tull, and she and her said brothers resided with their father the defendant F. M. Tull; that P. D. Tull is the brother of F. M. Tull and the uncle of the plaintiffs and their said brother.

6. That on the 31st day of December, 1889, at the city of Spokane Washington, the defendant F. M. Tull made executed and delivered to the defendant P. D. Tull as guardian of Dora May Tull, Wm. L. Tull and Ernest B. Tull, his certain promissory note in writing, for the sum of thirty-four thousand dollars, ($34,000.00) gold coin of the United States of America, dated December 31st, 1889,

18 payable five years from date and drawing interest at the rate of ten (10) per cent. per annum from date until paid.

7. To secure the payment of said note said defendant F. M. Tull, on the 31st day of Dec., 1889, executed and delivered to the defendant P. D. Tull as guardian of William L. Tull, Dora May Tull and Ernest B. Tull his certain indenture of mortgage which is in words and figures following to wit:—

"This indenture, made this 31st day of December in the year of our Lord 1889, between F. M. Tull the party of the first part, and P. D. Tull guardian of Dora M. Tull, Ernest B. Tull William L. Tull the party of the second part: witnesseth: That the said party of the first part for and in consideration of the sum of thirty-four thousand dollars gold coin of the United States, to him in hand paid, by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant bargain sell and convey and confirm unto the said party of the second part and to his successors and assigns the following-described tracts or parcels of land lying and being in the county of Spokane, State of Washington, and particularly bounded and described as follows, to wit:—Commencing at the northwest corner of block nineteen (19) in the city of Spokane Falls, and running thence east on the south line of Riverside Ave., one hundred feet; thence south parallel with the east line of Stevens street 99½ feet; thence west parallel with the south line of Riverside Ave., one hundred feet to the east line of Stevens street; thence north on the east line of Stevens street to place of beginning, together with all and singular the tenements hereditaments and appurtenances thereunto belonging.

This conveyance is intended as a mortgage to secure the payment of thirty-four thousand dollars gold coin of the United States, together with the interest thereon in like gold coin, at the rate of ten per cent. per annum from date until paid, according to the terms and conditions of one certain promissory note bearing even date herewith made by F. M. Tull, payable to said P. D. Tull as guardian aforesaid, five years from date; and these presents
19 shall be void if such payment be made according to the terms and conditions thereof; but in case default be made in the payment of the principal or interest of said promissory note or any part thereof, when the same become due and payable according to the terms and conditions thereof, then said party of the second part, his executors, administrators, successors and assigns are hereby empowered to sell the said premises, with all and every of the appurtenances or any part thereof in the manner prescribed by law, and out of the money arising from such sale to retain the whole of said principal and interest, whether the same shall then be due or not, together with the costs and charges of making such sale, and the overplus if any there be, shall be paid to the party making such sale or demand, to the said party of the first part his heirs or assigns: and in any suit or other proceeding that may be had for the recovery of said principal sum and interest on either said note or this mortgage it shall or may be lawful for the said party of the second part, his heirs, executors, administrators or assigns, to include in the judgment that may be recovered, counsel fees and charges of attorneys and counsel employed in such foreclosure suit, the sum of one thousand dollars in gold coin; or in case of settlement or payment being made after suit has been commenced, and before the final decree has been entered thereon, an attorney's fee of five hundred dollars in gold coin, shall be taxed as a part of the costs in such suit as well as all payments that the said party of the second

part, his heirs, executors, administrators or assigns may be obliged to make for his or their security by insurance or on account of any taxes charges encumbrances or assessments whatsoever on said premises or any part thereof.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) F. M. TULL. [SEAL.]

Signed sealed and delivered in presence of
F. H. GROMEZ. (?)
W. C. JONES.

20 STATE OF WASHINGTON, } ss:
County of Spokane, }

This is to certify that on the 31st day of December A. D. 1889, before me the undersigned, notary public in and for the State of Washington, duly commissioned and sworn, personally came F. M. Tull to me known to be the individual described in and who executed the within instrument and acknowledged to me that he signed and sealed the same as his free voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal, the day and year in this certificate first above written.

[SEAL.] (Signed) W. C. JONES,
Notary Public in and for Washin- Territory.

Filed Jan'y 4th 1890 at 10.29 a. m. Request of P. D. Tull.
M. D. SMITH, *Auditor,*
By C. E. BUTLER, *Deputy.*

Recorded Jan'y 30th 1890."

8. That on the 4th day of Jan. 1890, said mortgage was filed in the auditor's office of Spokane county, State of Washington, and the same was thereafter duly recorded in Book — of Mortgages of said county at page —.

9. That thereafter to wit: on the 7th day of April 1892, said P. D. Tull as guardian as aforesaid, executed a release in writing upon the margin of the record in the said auditor's office wherein said mortgage was recorded, releasing the mortgage above set forth together with the debt thereby secured to wit:—said promissory note for the sum of $34,000.00 executed by F. M. Tull which said marginal release is in words and figures following to wit:—

"This mortgage and the note secured thereby, fully paid satisfied and discharged this 7th day of April A. D. 1892—
Attest: J. J. L. PEEL, *Auditor,*
By W. H. HOSLER, *Deputy.*
P. D. TULL,
For the Heirs. [SEAL.]"

10. That said marginal release was executed by P. D. Tull as guardian without any order of the court or judgment of the court

authorizing or allowing him to execute the same; that at the time of of the execution of the said marginal release said P. D. Tull was pretending to act as guardian for plaintiffs and their brother; that the execution of the same was never brought to the attention or knowledge of the court; which then had jurisdiction of the
21 persons and property of these plaintiffs and the defendant Ernest B. Tull; that said marginal release was executed without the payment, discharge or satisfaction of the debt secured thereby and the same is now and always has been unpaid, undischarged and unsatisfied.

That said marginal discharge is wholly invalid and void and of no force and effect; that said mortgage is now, and at all the times since the 31st day of Dec., 1890, has been in full force and effect upon the said real estate contained and hereinafter described herein; That neither said note nor mortgage nor any part of the principal sum therein mentioned, nor the interest thereon, has ever been paid and said mortgage has never been paid nor satisfied nor discharged; that said marginal release was executed by P. D. Tull as guardian aforesaid, in violation of law and contrary to the statutes in such cases made and provided and without the order — court which had jurisdiction of the matter.

11. That said invalid release and marginal satisfaction executed by the said guardian as aforesaid was made pursuant to a conspiracy made and entered into by the defendants F. M. Tull, P. D. Tull and The German Savings & Loan Society some time in the year 1888, with the fraudulent purpose and intent among others, of cheating and defrauding these plaintiffs and defendant Ernest B. Tull.

That on the 12th day of August, 1889, these plaintiffs and Ernest B. Tull were the owners and were seized in fee-simple of the following-described real property situate in Spokane, Washington, to wit: an undivided one-half interest in and to that certain piece of real estate, commencing at a point on the south line of Riverside Ave., in the town now city of Spokane, State of Washington, one hundred feet easterly from the northwest corner of block 19, in said city, running thence along said line of said Riverside Ave., in an easterly direction fifty feet; thence at right angles in a southerly direction one hundred and eighty feet, more or less, to the north line of Sprague street thence at right angles along said line of Sprague street westerly sixty feet; thence in a northerly direction and a parallel with Stevens street in said city eighty feet;
22 thence in an easterly direction and parallel with the south line of Riverside Ave., ten feet; thence in a northerly direction parallel with said Stevens street to the place of beginning; which is the same property described in the mortgage made by F. M. Tull to P. D. Tull as guardian as aforesaid, and is set forth above herein.

That said F. M. and P. D. Tull then and there conspiring together and for the purpose and object of cheating and defrauding these plaintiffs and their said brother out of their said interest in said described real property, procured the defendant P. D. Tull to be appointed guardian aforesaid; that P. D. Tull as such guardian,

pursuant to the said conspiracy and fraudulent purposes set forth hereinabove, and made and entered into with F. M. Tull, filed a petition on the 12th day of August, 1889, in the proceeding in which he had been appointed guardian as aforesaid, to wit:—the proceedings on file in this court entitled "In the matter of the guardianship of William L. Tull *et al.*, and numbered 219 of causes in probate cases;" that all the substantial averments and allegations in said petition were false and untrue and were known to be such by said defendants, said property was not in the condition which said petition alleges it was in; that said property was amply insured and that at the time of the fire in August 1889, which destroyed the buildings on said property, the said buildings thereon were insured to the amount of $30,000.00 and upwards.

That said property was not mortgaged for the sum of $20,000.00 but plaintiffs aver upon information and belief that there was a mortgage on said property for a trifling amount only and that whatever the amount of said mortgage was, that the insurance on said buildings was more than sufficient to pay all mortgage indebtedness of the said F. M. Tull on the said property, or upon any of the so-called Tull Block property; that the said property herein described in this action was known as the Tull Block property; that at the time of said fire in August, 1889, there was upon said buildings on said property insurance to the amount of about $66,000.00.

That in the petition filed in said case August 1st, 1888, said guardian represented to said court that the above-described
23 property was mortgaged for the sum of $20,000.00; that said allegation was false and untrue; that said property as plaintiffs are informed and believe had no incumbrances against it at that time of any kind; that said allegations were a part of said conspiracy to cheat and defraud these plaintiffs and were made for the purpose of securing a sale of said property to F. M. Tull. That the defendant F. M. Tull, was the owner of the other half of the above-described property.

12. That pursuant to said petition and influenced thereby and acting upon the same the probate court of Spokane county, ordered and directed the defendant P. D. Tull as guardian to sell said property for cash to the highest bidder at public sale; that upon the hearing of said petition said probate court entered a decree in said guardianship matter proceedings, on the 12th day of Sept., 1889, directing said guardian to sell said property as aforesaid, all of which more fully appears by a reference to said proceedings.

Thereupon as the records in this court show, said P. D. Tull as guardian, on the 30th day of Nov., 1889, reported to said court that he had sold the herein-described property of these plaintiffs and defendant Ernest B. Tull to their father the defendant F. M. Tull and that said F. M. Tull was the highest and best bidder at said sale and that said bid was for the sum of $20,000.00 cash. That P. D. Tull as guardian officially reported said sale to said court and filed his report thereof in said cause on the 30th day of Nov. 1889.

13. That on the 30th day of December, 1889, upon the motion of P. D. Tull and F. M. Tull the sale of said real estate was by the

said probate court confirmed and said P. D. Tull as guardian was directed to make a conveyance of the said property to F. M. Tull.

That said order confirming said sale was filed in said court on the 10th day of December, 1889.

That defendant P. D. Tull as guardian aforesaid, made executed and delivered to F. M. Tull a guardian's deed purporting to convey thereby to F. M. Tull all the right title and interest of the
24 said plaintiffs and their said brother in and to the said real property described herein. That said deed executed as aforesaid was filed in the auditor's office for Spokane county, Washington, on the 11th day of Dec. 1889 and was recorded in Book — of Deeds at page — on the 29th day of Jan., 1890.

14. That the said sale of said property reported by P. D. Tull as guardian aforesaid was not for cash or for any consideration passing at that time or at the time said deed from P. D. Tull as guardian to F. M. Tull was executed.

That all the proceedings taken and instituted in said guardianship case No. 219, as aforesaid, and the proceedings herein set forth relative to the sale of said property *was* brought about and instituted by the defendants P. D. Tull and F. M. Tull for the purpose and object among other purposes and objects, of securing to F. M. Tull the whole, entire and undivided title and interest in and to said real estate and for the purposes of cheating and defrauding plaintiffs and Ernest B. Tull.

That F. M. Tull was in truth and fact the guardian of plaintiffs and their said brother and the appointment of P. D. Tull as such guardian was procured by F. M. Tull with the intent and purpose in view of securing to himself the undivided title and interest in and to said property.

That all of the proceedings and steps taken in case No. 219 as aforesaid, were cunningly devised and conceived by said F. M. Tull and P. D. Tull and the purpose and object of said proceedings was to secure for F. M. Tull the whole title of said property so that F. M. Tull might mortgage and encumber the same for his sole benefit and advantage and to cheat and defraud his children out of the same.

15. That the alleged purchase price and purported consideration paid by defendants F. M. Tull to P. D. Tull as guardian for said plaintiffs and their brother's interests in said real estate, to wit:—$20,000.00 was grossly inadequate; that at the date of said transfer to wit:—August 1889, plaintiffs' and Ernest B. Tull's interest in said property was worth the sum of $30,000.00 and upwards.

16. That twenty days after said order of sale was con-
25 firmed, pursuant to his said fraudulent intentions and purposes said F. M. Tull mortgaged a part of said real estate conveyed to him by said guardian's deed, to the German Savings & Loan Society, which said mortgage deed was made to secure F. M. Tull's promissory note for $25,000.00; said mortgage was executed on the 30th day of Dec., 1889, and was filed on said day in the said auditor's office and was by an indorsement on the margin of said

record in said office duly released and discharged by the German Savings & Loan Society on the 20th day of May, 1892.

That F. M. Tull mortgaged the other parts of said property about the same time to other persons to secure the payment of his promissory notes to the amount of $10,000.00 and upwards, which said mortgage- have been heretofore duly released.

17. Plaintiffs allege that said $25,000.00 mortgage and the other said mortgages had been negotiated and its terms and conditions had been fully agreed and determined upon by defendants F. M. Tull and The German Savings Society, previous to the filing of the guardian's petition to sell said real estate.

18. That prior to the 12th day of August, 1889, the date when P. D. Tull as guardian filed his petition to sell said real estate, the defendant The German Savings & Loan Society knew the condition of said property and all about the title to the same and plaintiffs allege the facts to be that the guardianship proceedings in case No. 219 mentioned herein, were arranged, conceived and all its essential details were settled and agreed upon by F. M. Tull, P. D. Tull as guardian and their attorneys and The German Savings & Loan Society and its attorneys:—that the attorneys of these several defendants jointly drew up and endited the various petitions and orders and papers filed in said case No. 219.

19. Said German Savings & Loan Society knew at the time of the execution of said guardian's deed and the execution of all the proceedings leading up thereto, that plaintiffs' and their brother's interests in said property *was* worth more than $20,000.00 and
26 that the said consideration mentioned in said deed was grossly inadequate and that plaintiff-' and said defendant's interests therein *was* worth the sum of $30,000.00 and upwards; said defendants further knew that the decree authorizing the sale of said property to F. M. Tull was a subtrifuge arranged by F. M. Tull for his own benefit and advantage.

20. That when P. D. Tull as guardian reported said sale of real estate to the said probate court for cash to F. M. Tull as aforesaid said German Savings & Loan Society knew said sale was false and that said sale was not for cash or for anything of value whatever; that no money of any kind changed hands between said parties at that time or at any time thereafter, and plaintiff- allege the facts that said report was made by said guardian falsely and fraudulently and as a part of the fraudulent purposes of F. M. Tull as aforesaid. Said order of sale and said guardian's deed were procured in manner aforesaid in order to allow F. M. Tull to mortgage said property to the German Savings & Loan Society and other persons as hereinbefore alleged.

That all of said guardianship proceedings herein mentioned were trumpted up and fraudulently conceived by F. M. Tull, P. D. Tull and the German Savings & Loan Society and their attorneys in order to give said proceedings a semblance of propriety and that the German Savings & Loan Society might appear as a *bona fide* purchaser or incumbrancre for value and without notice.

21. That after the 10th day of August, 1889, the date when the

order of said probate court was filed in said case No. 219, confirming said sale of real estate made by said guardian as aforesaid, no proceedings of any kind were thereafter taken in said matter and that said guardian never pretended to account to the court for the proceeds of said sale of real estate or to report to the said court the manner and the securities in which he had invested the proceeds thereof and that no account of his doings as such guardian or report of any kind has been filed in said case since the date last mentioned above.

22. That plaintiffs allege that said guardian invested the
27 proceeds of his said sale in the note of F. M. Tull for $34,000.00 which said note was secured by a mortgage on that piece of real estate described as commencing at the northwest corner of block 19 in the city of Spokane, Wash., and running east on the south line of Riverside Ave., 100 feet; thence south parallel with the east line of Stevens street 99½ feet; thence west parallel with the south line of Riverside avenue 100 feet to the east line of Stevens street to place of beginning; thence north on said east line of Stevens street to place of beginning, with the buildings thereon which is the same note and mortgage sued on herein and set forth.

That said note of $34,000.00 contains also the debt of $14,000.00 owed by F. M. Tull to plaintiffs and Ernest B. Tull and which is made the subject of the first cause of action joined herewith.

23. That when said guardian took said note and mortgage as security from F. M. Tull he knew that the German Savings & Loan Society knew that said mortgage was second to the mortgage of the German Savings & Loan Society on the same property which had been taken by that defendant to secure the payment of F. M. Tull's promissory note for $50,00-.00 which said mortgage was filed for record in the auditor's office for Spokane county on the 28th day of October, 1889, and recorded in Book 39 of Mortgages at page 611 in said office. That said mortgage was thereafter to wit:—on the 13th day of May, 1892 by instrument in writing duly executed by the German Savings & Loan Society pursuant to a resolution of its board of directors, released, cancelled and discharged which release and satisfaction piece was filed in the said auditor's office on the 20th day of May, 1892, and duly recorded among the records of Spokane county.

24. That on the 7th day of April, 1892, the mortgage sued on herein was fraudulently and unlawfully released by said guardian in the manner herein alleged before.

25. That after said $50,000.00 mortgage had been released as aforesaid, the German Savings & Loan Society well knowing the fraudulent intentions and purposes of F. M. and P. D. Tull and in violation of all of plaintiffs' rights in and to said property,
28 continued *and* course of dealing with said Tull concerning said property; that thereafter on the 5th day of May, 1892, F. M. Tull secured and negotiated a mortgage loan on the property herein described, which is the same property that plaintiffs seek to foreclose their mortgage on, from the German Savings & Loan Society to secure the payment of his promissory note for the sum of $100,000.00

that said mortgage deed was executed by F. M. Tull and filed for record in said auditor's office on the 5th day of May, 1892, and was recorded in Book 44 of Mortgages on page 101.

That thereafter on July, 10th, 1893, F. M. Tull mortgaged the whole of the above-described property to the German Savings & Loan Society to secure the payment of his promissory note for the sum of $20,000.00 which said mortgage deed was executed by F. M. Tull and filed for record in the said auditor's office on the 23rd day of May, 1893, and was recorded in Book 53 of Mortgages at page 392.

That it is by virtue of a deed secured by the foreclosure of the two mortgages just described that said German Savings & Loan Society claims title to said real estate.

26. That on the 20th day of Feb., 1894, said Dora May Tull was legally and lawfully married to Paul C. Dormitzer and they now are husband and wife and she is the same person named as Dora May Dormitzer plaintiff.

27. That at the time of said sale of real estate to F. M. Tull by the said guardian, no appraisers were appointed to appraise said property and that there were no bidders at said sale other than F. M. Tull, that said German Savings & Loan Society knew all of these facts as plaintiffs are informed and believe.

28. That the bond executed by the said guardian for the faithful discharge of his said duties as guardian of plaintiffs and their brother is invalid and void the same being not such a bond as the law requires from guardians; that the sureties thereon are insolvent and that P. D. Tull is unable to respond in damages to the amount of the said note and interest thereon.

29 That the bond required by statute from guardians when making a sale of their ward's property and filed in case No. 219 was cancelled and discharged by the said court immediately after the sale of said property and that the sureties thereon are insolvent.

29. That the Exchange National Bank a corporation, the Spokane Falls Gas Light Company, a corporation, and J. Grant Hinkle each has, or claims to have some interest in, or lien upon, the said mortgaged premises, or some portion thereof, the exact nature of which is to these plaintiffs unknown; but whatever the same may be plaintiffs allege that the claims, liens or interests of each and every of said defendants into or upon said mortgaged premises or any portion of the same, are subsequent and inferior to the lien of said mortgage thereon held by plaintiffs and Ernest Tull and the plaintiffs' rights and interests in and to said real estate.

30. That the defendant Ernest B. Tull is a minor of tender years to wit: of the age of about sixteen years and resides with his father F. M. Tull; that it — for the reason herein stated that he is made a party defendant to this action.

31. That the said plaintiffs had no knowledge or exact information of the alleged frauds set forth herein and practiced upon them by the above-named defendants, until just immediately before this action was commenced.

32. Wherefore, plaintiffs pray, upon the first cause of action, that

the release of their said mortgage and the satisfaction thereof executed in writing by P. D. Tull as guardian and filed as aforesaid by him in said auditor's office be cancelled, discharged, set aside and held for naught and that the same be declared to be a fraud upon plaintiffs and that it be declared absolutely void.

That plaintiffs have a personal judgment against the defendant F. M. Tull in the sum of fourteen thousand dollars ($14,000.00) together with the interest thereon at the rate of ten per cent. per annum from March 1st, 1889 until paid also in the sum of
30 $500.00 for attorneys' fees herein, together with all costs of suit and that each and every of the amounts above referred to and the interest be made payable in gold coin of the United States of America.

That the usual decree be made for the sale of said mortgaged premises, in the manner provided by law, and that the proceeds of said sale may be applied in payment of the amount found to be due to plaintiffs herein, and for principal, interest, attorneys' fees and costs of suit.

That the defendants in this complaint named, and each and every of them and all of them, and all persons claiming or to claim from, through, or under them, or either of them, subsequent to the execution of the mortgage above set forth, may be forever barred and foreclosed of and from all right estate title interest claim lien and equity of redemption of in to or upon said mortgaged premises, and every portion of the same.

That the mortgages claimed by the German Savings & Loan Society be especially declared subsequent to plaintiffs' mortgage.

That plaintiffs may have execution against the defendant F. M. Tull, or against any other property of his (not exempt from execution) for any deficiency which may remain after applying all of the proceeds of such sale of said mortgaged premises properly applicable thereto, toward the payment of whatever judgment it may recover against him in this cause of action.

That the plaintiffs may become the purchasers of said mortgaged property at such sale; that the purchaser may be let into possession thereof, upon the production of the sheriff's certificate of sale thereof.

That these plaintiffs may have such other and further relief in the premises as to this honorable court may seem meet, equitable and just.

Second. Upon the second cause of action, plaintiffs pray, that the release of their said mortgage and the satisfaction thereof executed
31 in writing by P. D. Tull as guardian and filed as aforesaid by him in said auditor's office, be cancelled, discharged, set aside and held for naught and that the same be declared to be a fraud upon the plaintiffs and it be declared absolutely void.

That plaintiffs have a personal judgment against the defendant F. M. Tull in the sum of thirty-four thousand dollars, ($34,000.00) together with interest thereon at the rate of 10 per cent. per annum from the 31st day of December, 1889, until paid, also in the sum of one thousand dollars ($1000.00) for attorneys' fees herein together

with all costs of suit and that each and every of the amounts above referred to and the said interest be made payable in gold coin of the United States of America.

That the usual decree be made for the sale of said mortgaged premises in the manner provided by law and that the proceeds of said sale may be applied in payment of the amount found due to plaintiffs herein, and for principal, interest, attorneys' fees, and costs of this action.

That defendants in this complaint named, and each and every of them and all of them, and all persons claiming or to claim from, through or under them, or either of them, subsequent to the execution of the mortgage of these plaintiffs above referred to and set forth may be forever barred and foreclosed of and from all right, estate title interest claim lien and equity of redemption of, in to or upon said mortgaged premises and every portion of the same.

That the mortgages claimed by the German Savings & Loan Society on said mortgaged premises be especially declared to be subsequent to plaintiffs' mortgage.

That plaintiffs have execution against the defendant F. M. Tull or against any other property of his (not exempt from execution) for any deficiency which may remain after applying all of the proceeds of such sale of said mortgaged premises, properly applicable thereto, toward the payment of whatever judgment it may recover against him in this cause of action.

That plaintiffs may become the purchasers of said mortgaged premises at such sale; that the purchaser may be let into
32 possession thereof, upon the production of the sheriff's certificate of sale hereof.

That these plaintiffs may have such other and further relief in the premises as to this honorable court may seem meet equitable and just.

NASH & NASH AND
P. C. DORMITZER,
Attorneys for Plaintiffs.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Dora May Dormitzer, being first duly sworn on oath deposes and says:

1. That she is one of the plaintiffs above named.

2. That she has read the foregoing complaint, knows the contents thereof and that she believes the same to be true; that the contents of said complaint are within her own knowledge, except those matters alleged upon information and belief and as to those matters she believes them to be true.

DOROTHY MAY DORMITZER.

Subscribed and sworn to before me this 9 day of April, 1897.

R. E. PORTERFIELD,
Notary Public, Residing at Spokane, State of Washington.

[NOTARIAL SEAL.]

Filed Ap'l 14, 1897, at 3 o'clock, p. m.
J. R. LOW, *Clerk.*
G. J. DONOVAN, *Deputy.*

33 STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court.

DORA MAY DORMITZER and WILLIAM L. TULL, Plaintiffs,
vs.
THE GERMAN SAVINGS AND LOAN SOCIETY, a Corporation; F. M. Tull, P. D. Tull, Individually and as Guardian; Exchange National Bank, a Corporation; Spokane Falls Gas Light Company, a Corporation; Ernest B. Tull, and J. Grant Hinkle, Defendants.

Answers of the defendant The German Savings and Loan Society to interrogatories of the above-named plaintiffs in this cause, served on the 21st day of April, 1897.

In answer to the 1st interrogatory this defendant says: That it had none.

In answer to the 2nd interrogatory this defendant says: That it had no attorneys-in-fact at the times stated; that at said times Messrs. Turner, Graves & McKinstry and Kinnaird & Happy acted, from time to time, as its attorneys-at-law.

In answer to the 3rd interrogatory this defendant says: B. Goldsmith, Abbington building, Portland, Oregon.

In answer to the 4th interrogatory this defendant says: $50,000 value of the land; $60,000 the value of the contemplated improvements to be thereafter placed thereon.

In answer to the 5th interrogatory this defendant says: B. Goldsmith as aforesaid, as the person who appraised and fixed the
34 value of the property, and Cox, Smith & Teal as the names of the attorneys-at-law who searched, examined and passed upon the title.

In answer to the 6th interrogatory this defendant says, that the said F. M. Tull did make an application, partly in handwriting and partly upon printed form.

In answer to the 7th interrogatory this defendant says, that a copy of the said application is hereto annexed marked "Exhibit A."

In answer to the 8th interrogatory this defendant says, that there never were any letters, nor was there any correspondence as in said 8th interrogatory mentioned, excepted the written application hereto already annexed and marked "Exhibit A."

In answer to the 9th interrogatory this defendant says, that there never were any letters, nor was there any correspondence as in said 9th interrogatory mentioned, save only a letter from B. Goldsmith to the president of this defendant, a copy of which letter is hereunto annexed, marked "Exhibit B," and made a part hereof.

That J. M. Kinnaird was not the attorney of this defendant at the times, or any of them, in said interrogatory stated.

In answer to the 10th interrogatory this defendant says, that B. Goldsmith is the only person who gave an opinion of the condition or character or status of the property in said interrogatory referred

to, a copy of which opinion is hereto annexed and marked "Exhibit A." J. M. Kinnaird did not give any opinion in writing or otherwise.

In answer to the 11th interrogatory this defendant says, that Horace Cutter did not, — so far as the knowledge of this defendant or any of its officers extends.

In answer to the 12th interrogatory this defendant says, that it repeats its answers to the 11th interrogatory, and states that
35 it has no opinions or appraisals to attach hereto.

In answer to the 13th interrogatory this defendant says: That the application was first made to the said B. Goldsmith and that the said B. Goldsmith forwarded the application to this defendant, together with his report upon the property.

In answer to the 14th interrogatory this defendant says: $50,000 the value of the property, and $60,000 the estimated cost of the contemplated improvements.

In answer to the 15th interrogatory this defendant says: Forty-fiftieths of the value of the land, and forty-one hundred and — tenths of the value of the land and the contemplated improvements.

In answer to the 16th interrogatory this defendant says:

(*a.*) Mortgage for $40,000, dated December 6, 1888; payable 3 years after date; interest 8 %; released November 5, 1889; attorneys, Cox, Smith and Teal.

(*b.*) Mortgage for $50,000, dated October 26, 1889, due October 26, 1892; interest 7½ %; released May 13, 1892; attorney Milton W. Smith.

(*c.*) Mortgage for $100,000, dated May 5, 1892, due July 26, 1895, interest 7 %; attorney Milton W. Smith.

(*d.*) Mortgage for $20,000 dated May 23, 1893, due May 23, 1896, interest 7 %; attorney Milton W. Smith.

In answer to the 17th interrogatory this defendant says: The said buildings were insured.

In answer to the 18th interrogatory this defendant says: The said buildings were insured for $40,000, and the loss was made payable to this defendant, and the buildings were damaged or totally destroyed by fire and this defendant got the benefit of this insurance.

In answer to the 19th interrogatory this defendant says: That the said F. M. Tull did not deliver the policies to this defendant, for this defendant had the policies in its possession at, before and after the fire.

In answer to the 20th interrogatory this defendant says:
36 That it is unable to answer the same, not now remembering what insurance companies had issued policies upon the property.

In answer to the 21st interrogatory this defendant says: Cox, Smith & Teal, attorneys-at-law, Portland, Oregon.

In answer to the 22nd interrogatory this defendant says: That it has no correspondence in its possession written by any person

relative to the disposition of the policies of insurance in said interrogatory referred to.

In answer to the 23rd interrogatory this defendant says: That the first application made to this defendant was in May, 1888, a copy of which application has already been annexed hereto.

In answer to the 24th interrogatory this defendant says: That the attorneys-at-law who examined the title to said property are Messrs. Cox, Smith & Teal, as aforesaid, and Milton W. Smith; and so far as this defendant knows, the persons who examined the land records, and upon whose examination said attorneys-at-law based their opinion are D. M. Thompson and Washington Abstract & Title Guaranty Company.

In answer to the 25th interrogatory this defendant says: That it is unable to give the result of the examination of the land records for the reason that the same was never furnished to it, and that it has not in its possession any writing stating the result of said examination.

In answer to the 26th interrogatory this defendant says: Upon its information and belief, that its attorneys, Cox, Smith & Teal and Milton W. Smith procured abstracts of the title to the property, in said interrogatory referred to, to be made by D. M. Thompson and the Washington Abstract & Title Guaranty Company.

37 In answer to the 27th interrogatory this defendant repeats the answer given by it to the 26th interrogatory, and says that it has not in its possession the abstracts, or any of them, in this interrogatory referred to. As this defendant believes, the said abstracts are either in the possession of the said Milton W. Smith of Portland, or Cyrus Happy, at Spokane.

STRUVE, ALLEN, HUGHES & McMICKEN AND CYRUS HAPPY,
Attorneys for the Defendant The German Savings and Loan Society.

38 STATE OF CALIFORNIA, *City and County of San Francisco,* } ss:

George Tourny, being duly sworn, deposes and says: That he is an officer to wit: the secretary of The German Savings and Loan Society, one of the defendants in the above-entitled action; that he has read the foregoing answers to interrogatories, and that said answers, and each of them, are true as he verily believes.

GEO. TOURNY.

Subscribed and sworn to before me this tenth day of May, 1897.

GEO. T. KNOX,
Notary Public in and for the City and County of San Francisco, State of California.
[NOTARIAL SEAL.]

39 EXHIBIT A.

1.

Application for Loan on City Real Estate.

PORTLAND, OREGON, *May 8th*, 1888.

To the board of directors of the German Savings and Loan Society, San Francisco, California.

GENTLEMEN: I desire to borrow of the German Savings and Loan Society, of San Francisco, California, the sum of forty thousand dollars ($40,000) in gold coin, repayable in like gold coin in three years and interest thereon in like gold coin from date of loan, until paid at the rate of eight per cent. per annum, said interest to be payable quarterly and I further offer the following real estate as security therefor, viz: Part of the lots 5 and 4 in block 19 situated and being in the city of Spokane Falls, county of Spokane, Territory of Washington, and bounded as follows:

On the southeast corner of Riverside avenues and Stevens streets and being 100 feet on the south side of Riverside avenue and 100 feet on east side of Stevens street.

The improvements on said lots when completed will consist of a three-story-and-basement brick and cut-stone building, front
40 pressed brick and cut stone of the value of $65,000. and are to be kept insured by me during the continuance of this loan to the amount of forty thousand ($40,000.00) dollars, loss if any, payable to the German Savings and Loan Society and I agree to pay all the taxes on said property and all the taxes assessed against the mortgage to be executed by me and in your favor for the amount of said loan, and I agree to deposit with you annually the tax receipts for all the taxes paid by me as above mentioned. Said premises to be, will be, are occupied by,

For 1 bank, 3 stores and offices, barber shop in basement
Value of lots fifty thousand dollars
Value of improvements, sixty-five thousand dollars
Assessed *at* without any improvements at $10,000.00
The rental value is when completed $1500 per month
The title is vested in me

I am the owner of the above-described premises and in actual possession of the same, that my title and possession have never been questioned, that there is no judgment against me in any of the courts of record in said county or in the United States court, that I do not owe any money to mechanics, builders or materialmen for work done or material furnished for improvements on the above-described premises, and that there are no other incumbrances on said property except as above stated.

And for the purpose of procuring said loan I declare the above statements to be true.

Dated Spokane Falls, this 8th day of May, 1888.

(Signed) F. M. TULL.

41 (EXHIBIT B.)

1.

PORTLAND, OREGON, *May 14th*, 1888.

L. Gottig, pres. G. S. & L. S., S. F.

DEAR SIR: During my recent visit at Spokane Falls the enclosed loan was offered. I send you by express the drawings of the buildings also statement from the architect. They are working now in excavating for the foundation and cutting stone for the front of the bldg. The property is well located being in the same block where the new P. O. bldg. is now being built. The building will be a nice and substantial one the lower stories of the building are already engaged and will be occupied as soon as finished at a good rental—the applicant is a solid business man, who is doing a good and profitable business and I can strongly recommend the acceptance of the loan as being perfectly safe and good. The owner expects to pay off the loan, if made to him from the profits of his business as he is now making money at the rate of $15,000 per year. * * *

Yours truly,

(Signed) B. GOLDSMITH.

42 (EXHIBIT C.)

Surveyor's Report.

The within is an application for a building loan.

I value the property without improvements at.....	$50000.
Improvements when completed not less than.....	60000.
Total	$110000.

My valuation and the owner's valuation of the lots is low. The owner has in fact been offered more for it. The property is well located and the building is now nearly all engaged and will be occupied as soon as finished. The owner is now expending and will expend on the building $20,000 before he will require any money from us.

The owner is a prosperous furniture and carpet dealer, and is worth outside of his real estate over and above all liabilities (he has hardly any) some forty thousand dollars, and expects to pay off this loan if we make it, from the profits in his legitimate business. I can strongly recommend the acceptance of this loan as being perfectly safe and good. The town of Spokane is growing and improving wonderfully & it is a substantial city with great prospects as to its future.

Arrangements can be made with First National Bank of Spokane Falls to pay the money in the same manner as Goetz & Baer's money is paid to them.

Portland, May 14th, 1888.

(Signed) B. GOLDSMITH.

Filed May 19, 1897 at 9.30 o'clock a. m.

J. R. LOW, *Clerk.*

——— ———, *Deputy.*

Service of the within answers to interrogatories is hereby acknowledged this 17th May, 1897,

NASH,
Of Attorneys for Plaintiffs.

Endorsement: Dora M. Dormitzer *et al.* pl't'f *vs.* German Savings & Loan Society a corp. Answers to interrogatories propounded def't.

43 In the Superior Court of the State of Washington in and for the County of Spokane.

DORA MAY DORMITZER and WILLIAM L. Tull, Plaintiffs,
vs.
THE GERMAN SAVINGS & LOAN SOCIETY, a Corporation; F. M. Tull, P. D. Tull, Individually and as Guardian; The Exchange National Bank, a Corporation; The Spokane Falls Gas Light Company, a Corporation; Ernest B. Tull, and J. Grant Hinkle, Defendants.

Amended Answer of the German Savings and Loan Society.

Comes now the above-named defendant The German Savings & Loan Society, a corporation, and by leave of the court first had and obtained, makes its amended answer to the first cause of action set forth in the complaint herein, as follows:

I.

For answer to paragraph 4, as to each of the matters therein contained, this defendant denies that it has any knowledge or information sufficient to form a belief.

II.

For answer to paragraph 5, as to whether at the time of the appointment of the said defendant as guardian, the said Dora (Tull) Dormitzer, William L. Tull and Ernest B. Tull were of the ages respectively of ten, fourteen and five years, as to whether the said plaintiff Dora May Dormitzer was at said time named Dora May Tull, as to whether she and her said brothers resided with their father, defendant F. M. Tull, as to whether P. D. Tull is the brother of F. M. Tull and the uncle of said plaintiffs and their said brother, and as to each of said allegations this defendant denies that
44 it has any knowledge or information respecting the same sufficient to form a belief.

III.

For answer to paragraph 6, defendant denies that it has any knowledge or information sufficient to form a belief touching the several allegations in said paragraph contained.

IV.

For answer to paragraph 7, defendant admits the making and acknowledgment of the instrument therein set forth, but denies each and every allegation in said paragraph contained.

V.

For answer to paragraph 11, defendant admits that said release was executed by said P. D. Tull as guardian, and that at the time of the execution of the said release, said P. D. Tull was the acting guardian of plaintiffs and said defendant Ernest B. Tull, and that on the margin of said mortgage in the records of said auditor's office is an endorsement of the discharge of the said mortgage, but denies each and every other allegation in paragraph 11 contained.

VI.

For answer to paragraph 12, admits that on the 1st day of August 1888, in said matter, number 219, cause of probate, the said P. D. Tull filed a petition, and that said petition alleged, among other things, that it would be beneficial to plaintiffs and said Ernest B. Tull to sell their interests in the real estate described in said paragraph, but denies each and every other allegation in said paragraph 12 contained.

VII.

For answer to paragraph 13, admits that pursuant to the
45 said petition, said probate court ordered and directed said P. D. Tull as guardian to sell said property to the highest bidder at public sale, and that on the 26th day of November, 1888, the said P. D. Tull as guardian reported to said court that he had sold the said described property to F. M. Tull, who was the highest and best bidder at said sale, and that the said bid was fourteen thousand dollars in cash, and that said P. D. Tull as such guardian reported said sale to said court and filed his report thereof on said 26th day of November, 1888, in said guardianship proceeding, but denies each and every other allegation in said paragraph contained.

VIII.

For answer to paragraph 14, denies that on motion of P. D. Tull or F. M. Tull or any other person than P. D. Tull said sale was confirmed by said probate court.

IX.

For answer to paragraphs 15 and 16, defendant denies the same and each and every allegation therein contained.

X.

For answer to paragraph 17, defendant admits that said F. M. Tull mortgaged said real estate to this defendant, The German Savings and Loan Society, to secure his negotiable promissory note for forty

thousand dollars, and that said mortgage was executed by said Tull on or about the 6th day of December, 1888, and was filed and recorded in said auditor's office in Book "S" of mortgages, on page 518, on the 21st day of January, 1889, but denies each and every other allegation in said paragraph contained.

XI.

For answer to paragraph 18, defendant denies the same and each and every allegation therein contained.

46

XII.

For answer to paragraph 19, defendant denies the same and each and every allegation in said paragraph 19 contained.

XIII.

For answer to paragraph 20, defendant denies the same and each and every allegation in said paragraph contained.

XIV.

For answer to paragraph 21, this defendant admits that said P. D. Tull as guardian reported said sale of real estate was made for cash to F. M. Tull as aforesaid, but denies each and every other allegation in said paragraph contained.

XV.

For answer to paragraph 22, as to whether at the time alleged or at any other time or at all the said P. D. Tull as guardian or otherwise made or filed the said instrument or report in said probate court to the effect that he had invested the proceeds of the sale of said real estate in a note of F. M. Tull secured by a mortgage on real estate, this defendant denies that it has any knowledge or information respecting the same suficient to form a belief, and denies that said guardian committed a fraud upon said court or upon said plaintiffs or any of them, as in said paragraph alleged or otherwise or at all. Denies that thie defendant knew that the said guardian had perpetrated the said alleged or any fraud upon said court, the said plaintiffs, or either of them or any of them.

XVI.

For answer to paragraph 23, admits that there appears upon the margin of the record wherein said mortgage is recorded, the words "irregularly released," but denies that said words were placed upon said record without authority of law or for the purpose of

47 cheating or defrauding plaintiffs and defendant Ernest B. Tull or either or any of them. Denies that this defendant procured or caused said words, or any of them, to be placed on said record to injure said plaintiffs, or any of them, or that the same was a part of the alleged fraudulent purpose in said paragraph mentioned, or any fraudulent or unlawful or improper purpose whatever.

XVII.

For answer to paragraph 24, this defendant admits that the said F. M. Tull mortgaged the said real estate to defendant to secure the payment of the promissory note of said F. M. Tull for the sum of fifty thousand dollars ($50,000), which mortgage was executed October 26th, 1889, and recorded in the auditor's office of Spokane county on the 28th day of November, 1889, but denies each and every other allegation in said paragraph contained.

XVIII.

For answer to paragraph 27, this defendant denies that it has any knowledge or information touching each and all of the matters in said paragraph contained sufficient to form a belief, except the allegation that the property mentioned in connection with the real estate described herein in said petition was fraudulently sold and disposed of to the German Savings and Loan Society, which allegation this defendant specifically denies.

XIX.

For answer to paragraph 29, as to whether at the time of said sale of said real estate to F. M. Tull by said guardian, no appraisers were appointed to appr-ise the said property, and no guardian *ad litem* was appointed to protect the interests of said plaintiffs, said Ernest B. Tull, or any of them, and that there were no bidders at said
48 sale except F. M. Tull, as to each and every of said allegations this defendant denies that it has any knowledge or information touching the same sufficient to form a belief. This defendant denies that it, the German Savings and Loan Society, knew of said alleged facts or any of them.

XX.

For answer to paragraph 30, this defendant denies that it has any knowledge or information touching the allegations or any of them in said paragraph contained sufficient to form a belief.

XXI.

For answer to paragraph 32, defendant denies that it has any knowledge or information respecting the same and each and every allegation thereof, sufficient to form a belief, except the minority of said Ernest B. Tull.

XXII.

For answer to paragraph 33, defendant denies the same and each and every allegation therein contained.

XXIII.

For answer to paragraph 34, defendant denies that five hundred dollars, or any sum, is a reasonable amount to be allowed plaintiffs for attorneys' fees in this action.

49 The said defendant The German Savings and Loan Society, makes amended answer to the second cause of action in said complaint, as follows:

I.

For answer to paragraph 4, as to each of the matters therein contained, this defendant denies that it has any knowledge or information sufficient to form a belief.

II.

For answer to paragraph 5, as to whether at the time of the appointment of the said defendant as guardian, the said Dora (Tull) Dormitzer, William L. Tull and Ernest B. Tull were of the ages respectively of ten, fourteen and five years, as to whether the said plaintiff Dora May Dormitzer was at said time named Dora May Tull, as to whether she and her said brothers resided with their father, defendant F. M. Tull, as to whether P. D. Tull is the brother of F. M. Tull and the uncle of plaintiffs and their said brother, and as to each of said allegations this defendant denies that it has any knowledge or information respecting the same sufficient to form a belief.

III.

For answer to paragraph 6, defendant denies that it has any knowledge or information sufficient to form a belief touching the several allegations in said paragraph contained.

IV.

For answer to paragraph 7, defendant admits the making and acknowledgment of the instrument therein set forth, but denies each and every other allegation in said paragraph contained.

V.

For answer to paragraph 10, defendant denies each and
50 every allegation therein contained.

VI.

For answer to paragraph 11, this defendant denies that the said release or marginal satisfaction executed by the said guardian as aforesaid, was made pursuant to the said alleged conspiracy or any conspiracy made or entered into by or between the said defendant P. D. Tull and F. M. Tull and The German Savings & Loan Society at the time therein alleged or at any time or between any of them with the fraudulent purpose or intent of cheating or defrauding these plaintiffs and said defendant Ernest B. Tull, or any of the said parties or any one or at all. Denies that on the 12th day of August, 1889, or at any other time, the said plaintiffs and said Ernest B. Tull, or any of them were the owners or seized in fee-simple or at all of the said described real estate in said paragraph named, or any of it, or had any right, title, interest, property or ownership therein. Denies that said property is the same property

described in the mortgage made by F. M. Tull to P. D. Tull as guardian. Denies that said F. M. Tull and P. D. Tull then and there conspired together and for the purpose and object of cheating or defrauding the said plaintiffs and their said brother, or either or any of them, out of said interest or alleged interest in said described property, or any part thereof, procured the defendant, P. D. Tull, to be appointed guardian as aforesaid or at all. Denies that said P. D. Tull as such guardian, pursuant to said alleged conspiracy or fraudulent purpose in said paragraph mentioned, or otherwise, made and entered into with said F. M. Tull, filed the petition in said paragraph mentioned, on the 12th day of August, 1889, or at any other time. Denies that all or any of the substantial averments or
51 allegations in said petition contained, were false or untrue, or were known to be such by said defendants, or either of them. Denies that said property was not in the condition in which the said petition alleges it was in.

As to the allegation that the insurance on said buildings was more than sufficient to pay all the mortgage indebtedness of said F. M. Tull on said property, or upon any of the so-called Tull Block property, this defendant denies that it has any knowledge or information touching the said allegation sufficient to form a belief. As to the allegation that the said property was not mortgaged for the sum of twenty thousand dollars but that the same was mortgaged for a trifling sum only, this defendant denies that it has any knowledge or information respecting the same sufficient to form a belief. As to whether in the said petition filed in said cause on August 1st, 1888, said guardian represented to said court that the said property was mortgaged for the sum of twenty thousand dollars or as — whether said allegation was false or untrue, this defendant denies that it has any knowledge or information sufficient to form a belief. Denies that said property had no incumbrance at that time of any kind. Denies that said allegations, or any of them, were a part of the said or any conspiracy to cheat or defraud said plaintiffs, or that the same or any of them were made for the purpose of securing a sale of the said property to F. M. Tull. Admits that F. M. Tull was the owner of half of the above-described property, and avers that he was the owner of the whole thereof and of all right, title and interest therein.

VII.

For answer to paragraph 12, this defendant admits that the probate court of said county ordered and directed the defendant
52 P. D. Tull as guardian to sell the said property for cash to the highest bidder at public sale, and that upon the hearing of said petition said probate court entered a decree in said proceedings directing said guardian to sell said property. That said P. D. Tull as said guardian on the 30th day of November, 1889, reported to said court that he had sold said described property to F. M. Tull and that said F. M. Tull was the highest and best bidder at such sale, and the said bid was for twenty thousand dollars in cash, and that said guardian officially reported said sale to said court and filed his report thereof

in said case on the 30th day of November 1889, but denies each and every other allegation in said paragraph contained.

VIII.

For answer to paragraph 13, denies that on motion of P. D. and F. M. Tull or any other person than P. D. Tull said sale was confirmed by said probate court.

IX.

For answer to paragraph 14, defendant denies the same and each and every allegation therein contained.

X.

For answer to paragraph 15, denies the same and each and every allegation therein contained.

XI.

For answer to paragraph 16, this defendant admits that F. M. Tull mortgaged part of said real estate conveyed to him by said
53 guardian's deed, to this defendant, that said mortgage deed was made to secure said F. M. Tull's promissory note for twenty-five thousand dollars. That said mortgage was executed on the 30th day of December 1889, and was filed on said day in said auditor's office and was by an endorsement on the margin of said record in said office duly released and discharged by the German Savings and Loan Society on the 20th day of May, 1892, but denies each and every other allegation in said paragraph contained.

XII.

For answer to paragraph 17, denies the same and each and every allegation therein contained.

XIII.

For answer to paragraph 18, denies the same and each and every allegation therein contained.

XIV.

For answer to paragraph 19, denies the same and each and every allegation in said paragraph contained.

XV.

For answer to paragraph 20, denies the same and each and every allegation therein contained.

XVI.

Touching each and all of the matters in paragraph 21 contained, this defendant denies that it has any knowledge or information sufficient to form a belief.

XVII.

For answer to paragraph 22, as to whether said guardian invested the proceeds of said sale in said note of F. M. Tull for thirty-
54 four thousand dollars, or as to whether said note was secured by said mortgage, this defendant denies that it has any knowledge or information touching the same sufficient to form a belief, or as to whether the said note of thirty-four thousand dollars contains the said alleged debt of fourteen thousand dollars, denies that it has any knowledge or information sufficient to form a belief.

XVIII.

For answer to paragraph 23, denies that when said guardian took said alleged note and mortgage of said F. M. Tull this defendant knew that said mortgage was second to the mortgage of said The German Savings and Loan Society which had been taken to secure said note of fifty thousand dollars.

XIX.

For answer to paragraph 24, this defendant denies the same and each and every allegation therein contained.

XX.

For answer to paragraph 25, this defendant admits that on the 5th day of May, 1892, said F. M. Tull secured and negotiated a mortgage loan on the property in said paragraph referred to, from this defendant, The German Savings and Loan Society, to secure the payment of his promissory note for the sum of one hundred thousand dollars; that the said mortgage deed was executed by said F. M. Tull and filed for record in said auditor's office on the 5th day of May, 1892, and was recorded in Book 44 of Mortgages, on page 101, and that thereafter, and on the 10th day of July, 1893, said F. M. Tull mortgaged the whole of the above-described property to this defendant to secure the payment of his promissory note for the sum of twenty thousand dollars, which said mortgage
55 deed was executed by F. M. Tull and recorded in said auditor's office on the 23rd day of May, 1893, in Book — of Mortgages, on page 392; and that by virtue of a deed secured by the foreclosure of the said two mortgages this defendant claims title to the said real estate. That this defendant denies each and every other allegation in said paragraph 25 contained.

XXI.

For answer to paragraph 27, as to whether at the time of said sale of real estate to F. M. Tull by such guardian no appraisers were appointed to appraise said property or as to whether there were no bidders at such sale other than F. M. Tull, this defendant denies that it has any knowledge or information touching the same sufficient to form a belief. Denies that this defendant knew all or any of those facts.

XXII.

For answer to paragraphs 28, this defendant denies that it has any knowledge or information sufficient to form a belief touching all and each of the matters alleged in said paragraph.

XXIII.

For answer to paragraph 30, denies any knowledge or information thereof sufficient to form a belief, except the minority of said Ernest B. Tull.

XXIV.

Answering paragraph 31, defendant denies each and all of the matters in paragraph 31 set forth.

XXV.

For answer to paragraph 32, denies that the sum of one
56 thousand dollars or any other sum is a reasonable amount to be allowed plaintiffs for an attorney's fee in this suit.

And by way of a further amended answer and defense to all of the matters in each of the causes of action in the complaint set forth, the defendant, The German Savings and Loan Society, a corporation, alleges as follows:—

I.

That it, the said The German Savings & Loan Society, is and at all of the times hereinafter mentioned was a corporation duly organized and existing under the laws of the State of California, with its office and principal place of business in the city of San Francisco, State of California. That said corporation has fully complied with the laws of the State of Washington in relation to foreign corporations transacting business in this State. That at all of said times it was among the objects of its corporate being to engage in and was engaged in dealing in securities and loaning money secured by mortgage upon real estate in the State of California, Oregon, and the Territory, now State, of Washington. That in making such loans it was the custom and practice of this defendant to require persons applying to it for loans to make a truthful and correct statement of the condition and title of the land upon which such loan was sought, and before the loan was made for the proposed mortgagor, at his own proper cost and expense to furnish to this defendant
57 a true and correct abstract of all conveyances or other instruments of writing on file or of record in the office of the county auditor or recorder of the county where such lands were situated in any way affecting the title to such real estate, duly certified by some reputable and competent searcher and abstracter of titles in the county where the said real estate was situated, to be placed in the hands of the legal adviser of this defendant, with the understanding and agreement between this defendant and the proposed mortgagor that if defendant's attorney certified the title to be perfect in the applicant for such loan, such loan should be made

and a mortgage given, otherwise not, and that in making such loans this defendant solely relied upon the certificate of its counsel based upon such abstract or abstracts of title.

II.

That agreeable to such practice and custom, defendant F. M. Tull, a resident of the city of Spokane Falls, in the county of Spokane, Territory, now State, of Washington, made application in writing to this defendant for a loan of forty thousand dollars, with mortgage security for the payment thereof upon parts of lots four (4) and five (5), in block nineteen (19), in said city of Spokane Falls, (the same being the premises referred to in paragraph 17 of plaintiffs' first cause of action,) and as an inducement to procure a loan thereon represented himself to be the owner of the said premises and in the actual possession thereof, with the unquestioned title thereto, and that there was no incumbrance against the said property. And in further compliance with said custom and practice of this defendant, the said F. M. Tull procured at his own proper cost and expense, a true and correct and duly certified abstract of all conveyances
58 or other instruments in writing on file or of record in the office of the county auditor or recorder of the county where such lands were situated in any way affecting the title to such real estate, certified by a reputable and competent searcher and abstracter of titles of said Spokane county, showing the fee-simple title to the said premises free from incumbrance in the said F. M. Tull, and the same was delivered to the attorneys and legal advisers of this defendant, Messrs. Cox, Smith & Teal, of Portland, Oregon, who upon said abstract certified to this defendant that the said F. M. Tull had a perfect title to said premises, free from all incumbrances. And, thereupon, relying upon the validity of said title as so certified, and being without any other information or means of information respecting the said title, this defendant loaned the said F. M. Tull the sum of forty thousand dollars, for which the said F. M. Tull made and delivered to this defendant his negotiable promissory note for said amount and secured the same by a mortgage upon the said premises, which said mortgage is the same forty-thousand-dollar mortgage mentioned and referred to in the complaint in this action. That it was a part of said agreement of loan of said forty thousand dollars that said F. M. Tull should in the name of and for the benefit of this defendant maintain fire insurance upon the buildings situated upon said premises, the loss, if any, to be paid to this defendant, and applied towards the liquidation of the said mortgage indebtedness. That shortly after the execution and delivery of the said mortgage, the buildings on said mortgaged premises were injured or destroyed by fire, and out of the proceeds of the said insurance and otherwise, the said mortgage indebtedness of forty thousand dollars was paid, and the said mortgage was by defendant released and discharged of record.

59 III.

That after the making of the said mortgage of forty thousand dollars, and after the destruction of the buildings upon said premises by fire, the said F. M. Tull made application to this defendant, in the month of August 1889, at its office in the city of San Francisco, California, in writing, for a mortgage loan of fifty thousand dollars, in manner, form and substance as heretofore in this affirmative defense set forth, and made the same representations as to ownership in fee-simple and freedom of incumbrance, save and except the incumbrance of said forty-thousand-dollar mortgage. And agreeably to the practice and custom of this defendant in such case, the said defendant F. M. Tull, at his own proper cost and expense, procured from a competent and reputable searcher and abstracter of titles in said Spokane county a true and correct abstract of all conveyances or other instruments in writing on file or of record in the office of the county auditor or recorder of the county where such lands were situated in any way affecting the title to the said real estate, duly certified, showing a perfect fee-simple title in said F. M. Tull, free from all incumbrance. That said abstract of title furnished defendant by said F. M. Tull was placed in the hands of the attorney and legal adviser of this defendant, Milton W. Smith, of Portland, Oregon, who on the 31st day of October 1889, on the basis of the said abstract, certified that the said F. M. Tull had a fee-simple title to the said premises, free from all incumbrances save said forty-thousand-dollar mortgage, and a certain grade tax amounting to about eight hundred dollars. That thereupon, and relying solely upon the opinion of its legal adviser to the effect that the title to the said premises was perfect in the said F. M. Tull, and being without
60 any other information or means of information respecting said title, this defendant was induced to and did make the said loan of fifty thousand dollars to the said F. M. Tull, in consideration whereof the said F. M. Tull executed his negotiable promissory note, payable to the order of this defendant, and secured the same by a mortgage upon said premises, duly executed and acknowledged by said Tull, which mortgage was executed October 26, 1889, and was duly filed for record in the office of the county auditor of said Spokane county on the 26th day of October, 1889, and duly recorded in Book W of Mortgages, at page 456; and said mortgage was the same instrument referred to in paragraph 24 of plaintiffs' first cause of action.

IV.

That afterwards, and on the 25th day of November, 1889, the said F. M. Tull, agreeably to the said custom and practice above set forth, applied in writing, to this defendant, at its office in the city of San Francisco, for a loan of twenty-five thousand dollars, secured by mortgage upon parts of lots three and four, in said block nineteen, in the city of Spokane Falls, being a parcel of land of fifty feet front on Riverside avenue, and extending into said block the same

width for a depth of one hundred feet, and lying immediately adjacent to the premises described in the said mortgage for fifty thousand dollars heretofore pleaded, and in said written application stated and represented that he was the owner in fee-simple of said premises and in the unquestioned possession of the same, and that the same were free from incumbrances. And thereupon the defendant F. M. Tull, agreeably to said practice and custom, procured at his own proper cost and expense a true and correct abstract of all conveyances
61 or other instruments in writing on file or of record in the office of the county auditor or recorder of the county where such lands were situated in any way affecting the title to such real estate, duly certified by a competent and reputable searcher and abstracter of titles residing in said Spokane county, and delivered the same to the attorney and legal adviser of this defendant, Milton W. Smith, residing at the city of Portland, State of Oregon, who basing his opinion upon the said abstract certified that said F. M. Tull had a fee-simple title to said premises free from all incumbrances save and except a certain incumbrance for street improvement and for the maintenance of a certain party wall upon said premises. That thereupon, and upon the faith of the opinion so rendered by its said attorney and adviser, and being without any other information or means of information respecting the said title, defendant loaned to said F. M. Tull the sum of twenty-five thousand dollars, in consideration whereof the said Tull made and delivered his negotiable promissory note in said amount to said defendant, The German Savings and Loan Society, and to secure the payment of the same duly made, executed and delivered his certain mortgage conveying the said premises to this defendant by way of mortgage, which was duly acknowledged, and which said mortgage was afterwards, on the 30th day of December, 1889, duly filed in the office of the auditor of said Spokane county, and recorded in Book 10 of Mortgages, at page 337 of the records of said auditor's office for Spokane county.

V.

That after the execution and recording of the said mortgages for fifty thousand and twenty-five thousand dollars, as afore-
62 said, the said F. M. Tull being desirous of obtaining a further loan of this defendant of twenty-five thousand dollars, and reducing the rate of interest on said loans to seven per cent. per annum, made application to this defendant for such loan and for the consolidating of the entire amount of his loan from this defendant theretofore existing, and including said additional loan, proposing to give to this defendant his negitiable promissory note for the sum of one hundred thousand dollars, with interest at seven per cent., and to secure the same with interest by a mortgage upon the premises described in said mortgages hereinabove in paragraphs 3 and 4 mentioned; and upon such application this defendant agreed to make such loan and to release and discharge the said notes for twenty-five and fifty thousand dollars respectively, and the mortgages securing the same, provided the said Tull still retained the

title to the said property in fee-simple, free from all incumbrances. That the said Tull, agreeably to said practice and custom of defendant, at his own proper cost and expense, procured and furnished to defendant a true and correct abstract of all conveyances or other instruments in writing on file or of record in the office of the county auditor or recorder of the county where such lands were situated in any way affecting the title to such real estate, duly certified to by D. H. Thompson, a reputable and competent abstracter and searcher of titles residing in Spokane county, Washington. That the said abstract was submitted to the said Milton W. Smith, an attorney-at-law residing at Portland, Oregon, the attorney and legal adviser of this defendant, who, on the 5th day of May, 1892, certified that the said F. M. Tull had at said time a fee-simple title to the said premises, free from
63 all incumbrances excepting a lease made by the said F. M. Tull to one Kellner and also certain grade taxes assessed on said property, and a certain easement for the erection and maintainance of a party wall thereon and excepting a lien against said Tull in favor of the Russell Manufacturing Company for about five thousand dollars. That relying solely upon the opinion of its said counsel, based upon the said abstract of title, and being without any other information or means of information respecting the said title, this defendant advanced the said additional money to the said F. M. Tull, who made and delivered his certain negotiable promissory note to this defendant for the sum of one hundred thousand dollars, in gold coin, with interest at the rate of seven per cent. per annum dated on or about May 5th, 1892, and payable three years from said date, and who, in order to secure the same, duly made, executed and delivered his certain deed of mortgage to secure the payment of the said note, the said premises described in the said two mortgages heretofore pleaded, securing the notes for fifty and twenty-five thousand dollars respectively; and that in consideration thereof the said notes for fifty and twenty-five thousand dollars respectively were surrendered, and the said mortgages securing the same were released and discharged. That the said mortgage securing the said one-hundred-thousand-dollar indebtedness was duly filed for record in the office of the county auditor of said Spokane county on the 5th day of May, 1892, and was duly recorded in Book 44 of Mortgages, page 101, being the same mortgage mentioned in paragraph 26 of plaintiffs' first cause of action.

VI.

That afterwards, and on or about the 5th day of May,
64 1893, the said F. M. Tull, agreeably to the said custom and practice hereinbefore set out, applied in writing, to this defendant, at its office in the city of San Francisco, California, for a loan of twenty thousand dollars, to be secured by mortgage upon the following-described real estate situate in Spokane county, Washington, to wit:

Beginning at the N. W. corner of block 19 of the city of Spokane Falls, according to the resurvey and addition thereto, thence south

along the east line of Stevens street ninety-nine and $\frac{44}{100}$ feet, thence at right angles in an easterly direction parallel with the south line of Riverside avenue one hundred feet, thence at right angles parallel with the east line of Stevens street in a northerly direction to Riverside avenue, thence westerly along Riverside avenue to the place of beginning; also

Beginning on the south line of Riverside avenue one hundred feet east of the N. W. corner of block 19 of the city of Spokane Falls, thence south parallel with the west line of said block 19 one hundred feet, thence east parallel with the north line of said block 19 fifty feet, thence north one hundred feet to the south line of Riverside avenue, thence west on said south line to the place of beginning; also

Beginning at a point on the north line of Sprague street ninety feet east from the S. W. corner of block 19, resurvey and addition to Spokane Falls, now Spokane, thence east along said north line of Sprague street sixty feet, thence north seventy-nine and $\frac{35}{100}$ feet, more or less to a point one hundreed feet south of the south line of Riverside avenue, thence west sixty feet, thence south seventy-nine and $\frac{35}{100}$ feet to the place of beginning.

65 That in his said written application the said defendant F. M. Tull stated and represented that he was the owner in fee-simple of said premises and in the unquestioned possession of the same, and that the same were free from incumbrance except the said mortgage for one hundred thousand dollars given to the defendant, The German Savings and Loan Society, hereinbefore set forth. And thereupon the said defendant F. M. Tull agreeably to said practice and custom of this defendant, hereinbefore set forth, procured at his own proper cost and expense a true and correct abstract of all conveyances or other instruments in writing on file or of record in the office of the county auditor or recorder of the county where such lands were situated in any way affecting the title to such real estate, duly certified by a competent and reputable searcher and abstracter of titles residing in said Spokane county, and delivered the same to the attorney and legal adviser of this defendant, Milton W. Smith, residing at the city of Portland, Oregon, who, basing his opinion upon the said abstract, certified that said F. M. Tull had a fee-simple title to said premises free from all incumbrances save and except the lien of the said mortgage for one hundred thousand dollars given by said defendant F. M. Tull to this defendant, The German Savings and Loan Society.

That thereupon, and upon the faith of the opinion so rendered by its said attorney and adviser, and being without any other information or means of information respecting the said title, defendant loaned to said F. M. Tull the said sum of twenty thousand dollars, in consideration whereof the said F. M. Tull made, executed and delivered his negotiable promissory note in said amount to said

66 defendant, The German Savings and Loan Society, and to secure the payment of the same duly made, executed and delivered, on the 23rd day of May, 1893, his certain mortgage deed conveying the said premises in said application described, set forth

in paragraph VI of this affirmative defense, by way of mortgage to this defendant, which said mortgage deed was duly acknowledged so as to be entitled to record and was afterwards, on the 10th day of July, 1893, duly filed in the office of the auditor of said Spokane county, and thereafter duly recorded in Book 53 of Mortgages, at page 392, of the records of said auditor's office for Spokane county, being the same mortgage mentioned in paragraph 25 of plaintiffs' second cause of action.

VII.

That thereafter, from time to time, the said F. M. Tull having failed to comply with the terms and conditions of the said mortgages, and having defaulted in the terms and conditions of each of said notes and mortgages, an action was begun in the United States circuit court for the district of Washington, eastern division, wherein this defendant was plaintiff and the said F. M. Tull, and others, were defendants, for the foreclosure of the said mortgages, and thereafter such proceedings were had that said court on the 23rd day of April, 1896, duly rendered its decree of foreclosure of both of the said mortgages, and directed a sale of the said property; and that subsequently, in pursuance of notice duly given, the said property was duly sold by a master of said court, and the same was purchased by this defendant at the master's foreclosure sale, and the report of the said master and the said sale were duly confirmed, and the
67 said property in pursuance of said sale and confirmation thereof was by the order and direction of the court duly transferred to this defendant, who is now the owner and holder of the said property in fee-simple and in the possession thereof, and that the deed secured by the foreclosure of the said two mortgages mentioned and described in plaintiffs' complaint is the same deed and foreclosure herein pleaded.

VIII.

That in making each and all of the said loans hereinbefore pleaded, and taking the said mortgages as security for the same, this defendant had no other knowledge or means of knowledge than that afforded by the public records concerning the title of said property as furnished in the several abstracts of title thereof upon the faith of which the said loans were made and the said mortgage securities taken, and that the record of each of the said mortgages in the said complaint pleaded as executed by said defendant F. M. Tull to said defendant P. D. Tull as guardian showed each of the said mortgages to have been fully paid, satisfied and discharged and the entries of payment, satisfaction, and discharge of the said mortgages upon which this defendant relied in making its said loans are the same releases of mortgage pleaded in paragraph 9 of plaintiffs' first cause of action and in paragraph 9 in plaintiffs' second cause of action; and that the said instruments of release respectively recite that the mortgage and note therein mentioned and secured thereby had been fully paid, satisfied and discharged. And this defendant upon its information and belief alleges that in truth and

in fact the same had been so paid and discharged, and that
68 this defendant never knew to the contrary, but in making said loans and advancing said money and in taking security therefor, fully relied upon the truthfulness and good faith of the said releases, discharges and acknowledgments of payment as the same appear of record; and the said mortgagee discharging the same was authorized to make and file said releases and discharges, and defendant so believed and without such belief on its part none of the said moneys would have been loaned and advanced by this defendant.

That the said attorneys employed by defendant, as aforesaid, to pass opinons upon such titles were and are skillful and competent attorneys learned in the law.

69 And by way of a further and second amended answer and defense to the matters in each of the causes of action in said complaint set forth, this defendant alleges:—

I.

That it, the said The German Savings and Loan Society, is, and at all of the times hereinafter mentioned was a corporation, duly organized and existing under the laws of the State of California, with its office and principal place of business in the city of San Francisco State of California. That said corporation has fully complied with the laws of the State of Washington relating to foreign corporations transacting business in this State. That at all of the said times it was among the objects of its corporate being to engage in and it was engaged in dealing in securities and loaning money secured by mortgage upon real estate in the States of California, Oregon and the Territory, now State, of Washington.

II.

That on or about the 3rd day of March 1870, the said defendant herein, F. M. Tull and one Lucy A. Tull were intermarried and became lawful husband and wife, and from said 3rd day of March 1870 and up to the 20th day of May, 1887, inclusive, they continuously resided in and were actual *bona fide* householders, residents, inhabitants and citizens of the State of Kansas. That on or before October 31st 1868 the legislature of the State of Kansas duly and regularly passed and executed as a law of said State, an act entitled, "An act concerning district courts." That section 1 of said act provides as follows:

70 "(1765.) SECTION 1.—Jurisdiction.—SECTION 1. There shall "be in each county organized for judicial purposes, a dis- "trict court, which shall be a court of record, and shall have general "original jurisdiction of all matters, both civil and criminal (not "otherwise provided by law); and jurisdiction in cases of appeal and "error from all inferior courts and tribunals, and shall have a gen- "eral supervision and control of all such inferior courts and tribu- "nals, to prevent and correct errors and abuses."

That said act and each and every section and part thereof took effect October 31st 1868, and ever since has been, and now is, a gen-

eral law of the said State of Kansas, in full force and effect, unrepealed and unamended.

That thereafter, on or before the 16th day of March 1871, the legislature of the said State of Kansas duly passed and enacted, as a general law of said State, an act entitled,—"Divorce and alimony." That section 639 of said act provides, and is in words and figures as follows, to wit:

"(4457.) SECTION 639.—Causes.—SEC. 639. The district court may "grant a divorce for any of the following causes:

"First, When either of the parties had a former husband or wife "living at the time of the subsequent marriage. Second, Abandon-"ment for one year. Third, Adultery. Fourth, Impotency. Fifth, "When the wife, at the time of the marriage, was pregnant by "another than her husband. Sixth, Extreme cruelty. Seventh, "Fraudulent contract. Eighth, Habitual drunkenness. Ninth, "Gross neglect of duty. Tenth, The conviction of a felony, and im-"prisonment in the penitentiary therefor, subsequent to the mar-"riage."

That said act and each and every section and part thereof took effect March 16th, 1871, and ever since has been, and now is, a general law of the said State of Kansas, in full force and effect, unrepealed and unamended.

That thereafter, to wit, on the 25th day of February 1887, the said defendant herein, F. M. Tull, as plaintiff, filed his complaint and commenced an action in the district court of Kingman county, in the said State of Kansas, a court of superior jurisdiction as aforesaid against the said Lucy A. Tull, (then living), as defend-
71 ant, wherein and in which complaint he alleged as a cause of action against the said Lucy A. Tull, that the said Lucy A. Tull had, on numerous and divers times and different places, committed adultery, and had carnal intercourse with many persons in said complaint mentioned, and in said complaint prayed judgment that the bonds of matrimony between himself and the said defendant Lucy A. Tull be dissolved and held for naught, a copy of which said complaint is hereto attached, marked "Exhibit A," hereby referred to and made a part of this amended answer.

That on or before the 23rd day of February, 1871, the legislature of the State of Kansas, passed and exacted as a law of the said State, an act entitled,—"Commencement of a civil action." And section 72 of said act provides, and is in the words and figures following, to wit:—

"(3871.) SECTION 72.—Publication.—SEC. 72.—Service may be had "by publication in either of the following cases: In actions brought "under the forty-sixth and forty-seventh sections of this code, where "any and all of the defendants reside out of the State; in actions "brought to establish or set aside a will, where any or all of the de-"fendants reside out of the State; in actions to obtain a divorce when "the defendant resides out of the State; in actions brought against "a non-resident of the State, or a foreign corporation having in this "State property or debts owing to them, sought to be taken by any "of the provisional remedies, or to be appropriated in any way;

"in actions which relate to, or the subject of which is, real or per-
"sonal property in this State, where any defendant has or claims
"a lien or interest, actual or contingent, therein, or the relief de-
"manded consists partly or wholly in excluding him from any
"interest therein, and such defendant is a non-resident of the State,
"*or a foreign corporation; and in all actions where the defendant,*
"being a resident of this State, has departed therefrom, or from the
"county of his residence, with intent to delay or defraud his cred-
"itors, or to avoid the service of a summons, or keeps himself con-
"cealed therein with the like intent."

And section 76 of the said act provides, and is in the words and figures as follows, to wit:—

"(3875.) SECTION 76.—Personal service on non-residents.—SEC.
"76. In all cases where service may be made by publication, per-
"sonal service of summons may be made out of the State by the
"sheriff of the county in which such service may be made. Such
"summons shall be issued by the clerk, under seal of the court, and
"directed to the defendant or defendants to be served, and
72 "shall notify him or them that he or they have been sued
"by the plaintiff or plaintiffs, naming him or them, and re-
"quiring him or them to answer the petition filed by the plaintiff
"or plaintiffs, naming him or them, in the clerk's office, of the
"court, which shall be named, within sixty days from the day of
"service, or the said petition will be taken as true, and judgment
"rendered accordingly. Such service may be proved by the affi-
"davit of the person making the same, before a clerk of a court of
"record, or other officer holding the seal thereof, or before some
"commissioner appointed by the governor of this State, under an
"act providing for the appointment of commissioners to take depo-
"sitions, etc.,: Provided, that such service when made and proved as
"aforesaid, shall have the same force and effect as service obtained
"by publication, and no other or greater force or effect."

That said act and each and every section and part thereof took effect on or about the 23rd day of February 1871, and was, and now is, a general law of the said State of Kansas, in full force and effect, unrepealed and unamended.

That thereafter personal service of the summons and complaint under and by virtue of the laws of the State of Kansas, as hereinabove set out and mentioned, was duly and regularly had and served upon the said Lucy A. Tull in the State of California.

That thereafter, to wit—on the 20th day of May 1887, the said district court of Kingman county, State of Kansas, then and there having jurisdiction of both the subject-matter and of the parties thereto, granted the prayer of the said plaintiff, and then and there duly and regularly ordered and adjudged and entered a decree, then and there and forever dissolving the bonds of matrimony before that time existing between the said plaintiff and the said Lucy A. Tull, by reason of the faults, miscarriages and aggression of the said defendant Lucy A. Tull as set out and mentioned in his said complaint, and thereafter and until the subsequent marriage between

the said F. M. Tull and the said Lucy A. Tull, each of them became and remained single persons.

73 That while the said defendant F. M. Tull was a resident of and domiciled in the said State of Kansas as hereinabove mentioned, he acquired, held, owned and possessed property, consisting of goods, chattels, choses in action and money of the value of thirty-five thousand dollars, and owned and possessed said property in said State of Kansas on the 20th day of May 1887.

That section 646 of the act entitled,—"Divorce and alimony," hereinabove mentioned, provides and is in the following words and figures, to wit:—

"(4464.) SECTION 646.—Property, rights, etc., alimony.—SEC. 646. "When a divorce shall be granted by reason of the fault or aggres- "sion of the husband, the wife shall be restored to all her lands, "tenements and hereditaments not previously disposed of, and re- "stored to her maiden name, if she so desires, and shall be allowed "such alimony out of her husband's real and personal property as "the court shall think reasonable, having due regard to the prop- "erty which came to him by marriage, and the value of his real "and personal estate at the time of said divorce, which alimony "shall be allowed to her in real or personal property, or both, or by "decreeing to her such sum of money, payable either in gross or in- "stallments, as the court may deem just and equitable; and if the "wife survive her husband, she shall also be entitled to her right of "dower in the real estate of her husband, not allowed her as ali- "mony, of which he was seized at the time during the coverture, to "which she had not relinquished her right of dower, but if the de- "cree shall arise by reason of the fault or aggression of the wife, she "shall be barred of all right of dower in the lands of which her "husband shall be seized at the time of the filing of the petition for "divorce, or which he may thereafter acquire whether there be issue "or not; and the court shall order restoration to her of the whole of "the lands, tenements or hereditaments not previously disposed of, "and also such share of her husband's real or personal property or "both, as to such court may appear just and reasonable."

And section 647 of said act provides, and is in the following words and figures, to wit:—

"(4465.) SECTION 647.—Effect; review; bigamy.—SEC. 647. A "divorce granted at the instance of one party shall operate as a dis- "solution of the marriage contract as to both, and shall be a bar to "any claim of the party, for whose fault it was granted, in or to the "property of the other; and no proceeding for reversing or vacating "the judgment or decree divorcing said parties shall be commenced "unless within six months after the rendition of said judgment or "decree, and during said six months and the pendency of said pro-

"ceeding for reversing or vacating said judgment or decree

74 "it shall be unlawful for either of said parties to marry, and

"any person so marrying shall be deemed guilty of bigamy: "Provided, such decree shall be final; and no proceedings in error "to the supreme court shall be allowed or taken unless a notice of "an intention to prosecute such proceedings in error be given in

"open court and noted in the journal of the court, within three days "after the entry of the decree or judgment, and the petition in error "and transcript be filed in the supreme court within three months "after the rendition of such judgment or decree."

That on or before the 31st day of October 1868, the legislature of the State of Kansas duly and regularly passed and enacted as a law of the said State, an act entitled, "Descents and distributions." And section 8 of said act provides, and is in the words and figures following, to wit:—

"(2246.) SECTION 8.—Wife surviving husband; evidence of mar- "riage.—SEC. 8. One-half in value of all the real estate in which "the husband, at any time during the marriage, had a legal or equi- "table interest, which has not been sold on execution or other judi- "cial sale, and not necessary for the payment of debts, and of which "the wife has made no conveyance, shall, under the direction of the "probate court, be set apart by the executor as her property, in fee- "simple, upon the death of the husband, if she survives him: Pro- "vided, that the wife shall not be entitled to any interest, under "the provisions of this section, in any land to which the husband "has made a conveyance, when the wife, at the time of the convey- "ance, is not or never has been a resident of the State. Continuous "cohabitation as husband and wife is presumptive evidence of mar- "riage, for the purpose of giving the right aforesaid."

And section 28 of said act provides, and is in the words and figures following, to wit:—

"(2266.) SECTION 28.—Provisions applicable to husband; estates "abolished.—SEC. 28. All the provisions hereinabove made, in rela- "tion to the widow of a deceased husband, shall be applicable to the "husband of a dec-ased wife. Each is entitled to the same rights "or portion in the estate of the other, and like interests shall in the "same manner descend to their respective heirs. The estates of "dower and by courtesy are abolished."

That the said act and each and every section and part thereof took effect October 31st, 1868, and ever since has been, and now is, a general law of the said State of Kansas, in full force and effect, unrepealed and unamended.

75 That the said Lucy A. Tull, her heirs, assigns, administrators or legal representatives, under or by virtue of the laws of the State of Kansas, has or had no other right or interest in and to the said property of the said defendant F. M. Tull, neither real nor personal, except that given by the laws of said State of Kansas, hereinabove last mentioned, and which interest, if at all, became vested in the realty only, in the event of the said defendant F. M. Tull's death. But that on the dissolution of the said marriage aforesaid, and her death, the interest of the said Lucy A. Tull, her heirs, assigns, administrators or legal representatives, in or to the said property of the said F. M. Tull, ceased to exist under said laws, and the said F. M. Tull, under the laws of the said State of Kansas, then and there became, and thereafter remained, the owner of the said property, free from any interest, absolute or contingent, present or

remote, of his said former wife Lucy A. Tull, or her heirs, assigns, executors, administrators or legal representatives.

III.

That after the granting of the said decree of divorce the said F. M. Tull converted all of his property, real and personal, in the said State of Kansas, into money and removed with the same to the State of Washington and the city of Spokane Falls and became a citizen thereof, and purchased the said property hereinbefore in the first affirmative defense mentioned and described being the same property acquired by this defendant under and by virtue of the decree of foreclosure in the said first affirmative defense pleaded. The contract for the purchase of the said property was made by said F. M. Tull after the granting of the said decree of divorce and the money with which the said purchase price for said properties was
76 paid was a part of the money brought by said plaintiff with him from the said State of Kansas, and acquired by him in the manner aforesaid, and that after the payment of the purchase price thereof deeds of conveyance were duly made, executed and delivered to him by James N. Glover and wife, the vendors of said property, as follows:

On June 17th, 1887, all that portion of the said premises beginning at a point on the south line of Riverside avenue, ninety feet east of the northwest corner of said block 19, running thence east along the said south line of said Riverside avenue sixty feet, thence south one hundred and seventy-nine feet more or less to Sprague street, thence west along Sprague street sixty feet, thence north to the place of beginning; and on

August 19th, 1887, conveying the remaining portion of said premises: Beginning at the northwest corner of said block 19, running thence east along the north line of said block, ninety feet, thence south at right angles with said north line ninety feet more or less, thence westerly parallel with said north line ninety feet to the west line of the said block 19, thence north along the said west line to the place of beginning.

IV.

That after the granting of the said divorce, on the 20th day of May, 1887, the said Lucy A. Tull, then living, removed to the State of Washington, and on the 13th day of August, 1887, the said defendant F. M. Tull and the said Lucy A. Tull were again lawfully intermarried and became husband and wife, and so remained until the death of the said Lucy A. Tull on the 18th day of July, 1888.

76½ V.

That the said Lucy A. Tull during her lifetime never acquired or had any title, interest, estate, claim or ownership absolute or conditional in the said premises, or any interest therein, and that neither the said plaintiffs nor the said defendant Ernest B. Tull, as the children and heirs of the said F. M. Tull and the said Lucy A. Tull, or otherwise, ever acquired, owned, or had any estate, right,

title or interest of any kind or nature whatsoever in or to the said premises, or any part thereof, as this defendant is informed and verily believes.

VI.

That the said guardian's sale of an undivided one-half of a portion of the said property, for the sum of fourteen thousand dollars and the said guardian's sale of an undivided one-half of the other portion of the said property for the sum of twenty thousand dollars, in said complaint pleaded and set forth, were made by the mutual mistake of the said F. M. Tull and P. D. Tull, and of all parties, and under the false and mistaken belief that the said Lucy A. Tull deceased, was in her lifetime, by virtue of being the wife of the said F. M. Tull, the owner of an undivided one-half interest in said property, as the community property of the said F. M. Tull and Lucy A. Tull, as husband and wife, whereas in truth and in fact the said premises were not community property and were owned by the said F. M. Tull as his separate property, and no title, interest, right or claim thereto passed to the said plaintiffs or to the said defendant Ernest B. Tull by reason of the death of the said Lucy A. Tull and they, or either of them, did not thereby or in any other manner have any right, title or interest of any nature in said property, and that the sole consideration for the said notes of fourteen thousand dollars and thirty-four thousand dollars was the supposed interest of the said plaintiffs and said defendant Ernest B. Tull in the said real estate, and each of the said notes and the said mortgages in said complaint pleaded securing the same were wholly without consideration and void.

77

VII.

That the said moneys loaned by the defendant to the said F. M. Tull for which the security of the said mortgages heretofore pleaded *were* given, was so loaned with the understanding and agreement between the parties that the same was to be and was used in erecting buildings and in making permanent improvements upon said property, and the removal of divers and sundry liens upon said property.

VIII.

That prior to the foreclosure of the said mortgages, as heretofore pleaded, the said F. M. Tull became and continues insolvent. That the said property conveyed by the said mortgages foreclosed as aforesaid was no more than adequate security for the mortgage indentedness of defendant and if the said plaintiffs or defendant Ernest B. Tull are permitted to assert the superiority of the said mortgages in their complaint pleaded, this defendant will be deprived of its security and be cheated and defrauded out of its said property.

IX.

This defendant alleges that on the 10th day of December 1894, the said defendant F. M. Tull, as plaintiff, began an action in this court as guardian of said Dora May Dormitzer,

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Ernest B. Tull, William L. Tull and Paul Dormitzer as defendants, wherein in the complaint it was alleged that on the 23rd day of July 1888, P. D. Tull, defendant in said action, was by the order of said probate court of Spokane county, Territory of Washington, duly and regularly appointed guardian of the persons and estates of the said William L. Tull, Dora May Dormitzer (then Dora May Tull) and Ernest B. Tull, all of whom were alleged to be minors.

And further alleging that the said William L. Tull, since said time before the bringing of said action, reached his majority, and the said Dora May Tull and Ernest B. Tull were over the age of fourteen years, but were still under the age — majority; that the said William L. Tull had not since reaching his majority, had any accounting with said P. D. Tull, or received from him any portion of the estate.

That the said defendant Paul Dormitzer intermarried with the defendant Dora May Dormitzer (theretofore Dora May Tull), and that since said intermarriage the said Paul and Dora May Dormitzer were husband and wife.

And also alleging that on the 3rd day of March 1870, the said F. M. Tull, the plaintiff in said action, and Lucy A. Tull, at the time of the commencement of said action, deceased, intermarried in the State of Missouri, and thereafter until the decree of divorce in said complaint afterwards pleaded, continued to be husband and wife, and citizens of the State of Missouri and of the State of
79 Kansas; and that the defendants William L. Tull, Dora May Dormitzer and Ernest B. Tull were the children of F. M. Tull and Lucy A. Tull, the fruits of said marriage.

And further alleging that on the 20th day of May 1887, the said F. M. Tull was a resident of and domiciled in the State of Kansas, and acquired, held, owned and possessed real and personal property consisting of goods, chattels, choses in action and money of the value of twenty-five thousand dollars, and owned and possessed said property in the State of Kansas on the said 20th day of May 1887. And that on the 20th day of May 1887, in the district court of Kingman county, State of Kansas, the same being a court of superior jurisdiction, in an action pending in said court between the said F. M. Tull as plaintiff, and the said Lucy A. Tull, then living, as defendant, of which action the said district court had jurisdiction both of the subject-matter and of the parties, a decree was duly and regularly rendered dissolving and annulling the bonds of matrimony before that time existing between the said F. M. Tull and Lucy A. Tull, and thereafter until the subsequent marriage between said F. M. Tull and Lucy A. Tull, each of them became and remained single persons.

And further alleging that under the laws of the State of Kansas, all real and personal property acquired by said F. M. Tull in said State during the continuance of the marriage relation between himself and the said Lucy A. Tull, belonged to and was vested in said F. M. Tull, as the owner thereof, subject only to a dower interest of the said wife in the realty, in the event of his death; and that on the dissolution of the said marriage as aforesaid, the said dower in-

terest of the said wife, Lucy A. Tull, ceased to exist under the
80 laws of the said State of Kansas, and said F. M. Tull under the said laws, then became and thereafter remained the owner of said property, real and personal, free from any dower, absolute or contingent, present or remote, of his said former wife Lucy A. Tull.

And further alleging that after the granting of said decree of divorce, the said F. M. Tull converted all his property, real and personal in the State of Kansas, into money and removed with it into the Territory of Washington, and there invested fourteen thousand five hundred dollars of it in the following-described real estate, situated in the city and county of Spokane, Territory of Washington, to wit:—Beginning at a point on the south line of Riverside avenue ninety feet east of the northwest corner of said block 19, of the town of Spokane Falls, running thence east along said south line of Riverside avenue sixty feet, thence south one hundred and seventy-nine feet more or less to Sprague street, thence west along Sprague street sixty feet, thence north to the place of beginning. Also beginning at the northwest corner of said block 19 of the town of Spokane Falls, according to the plat of the survey thereof, running thence east along the north line of said block 19, ninety feet; thence south at right angles with said north line ninety-nine feet more or less, thence westerly parallel with the said north line ninety feet to the west line of said block 19; thence north along the said west line to the place of beginning, being the same premises described in the two mortgages set forth in the plaintiffs' —.

And also averred that the contract of purchase of the said real property was made by the said F. M. Tull after the granting
81 of said decree of divorce; and that the two certain deeds conveying said property to the said F. M. Tull were made respectively on the 17th day of June 1887 and the 19th day of August 1887, and the money for which the purchase price of said property was paid, was part of the moneys brought by said F. M. Tull from the State of Kansas, acquired by him in the manner aforesaid.

And further alleging that the said Lucy A. Tull removed to the Territory of Washington on the 13th of August, 1887; and that the said F. M. Tull and the said Lucy A. Tull again intermarried and became husband and wife, and so remained until the death of the said Lucy A. Tull, which occurred on the 18th day of July 1888.

And further alleging that after the death of the said Lucy A. Tull, the defendant in said action, P. D. Tull acting as the guardian of the other defendants therein, Dora May Dormitzer, Ernest B. Tull and William L. Tull, all of whom were then minors, applied to the probate court of said Spokane county, and obtained from said court an order and decree to sell, in the manner provided by law, as the property of the said defendants William L. Tull, Dora May Dormitzer and Ernest B. Tull for the purpose of reinvestment, an undivided one-half interest in the said tract last above described as commencing at the northwest corner of block 19.

And it was alleged that on the 26th day of November 1888, the said property was, pursuant to said order of sale, sold by the said

guardian and bought by the said F. M. Tull, for the sum of fourteen thousand dollars.

And further alleging that on the 4th day of September, 1889,
82 the said defendant in said action, P. D. Tull, applied to and obtained from said probate court of Spokane county, an order and decree to sell, in the manner provided by law, as the property of said defendants in said action for the purpose of reinvestment, an undivided one-half interest in that parcel of land next hereinbefore described as commencing at a place on the south line of Riverside avenue, ninety feet easterly from the northwest corner of the said Riverside avenue.

And further alleging that on the 30th day of November 1889, the same was, pursuant to said order of sale, sold by said guardian and bought by said F. M. Tull for the sum of twenty thousand dollars, and the property so sold by said guardian and purchased by said F. M. Tull was an undivided one-half interest in the property acquired by said F. M. Tull in the manner hereinbefore in said complaint recited.

Further alleging, that upon the purchase of the first of said parcels of property, said F. M. Tull executed and delivered to P. D. Tull as guardian of each of said defendants in said action mentioned, his promissory note for the amount of the purchase price thereof, and on the purchase of the second of said parcels of land, alleging that said promissory note was delivered up to said F. M. Tull, and a new note for thirty-four thousand dollars was made and delivered by said F. M. Tull to said P. D. Tull as guardian, the same being the purported purchase price of both parcels of land.

And further alleging that the said P. D. Tull as such guardian,
and as the results of said transactions at the time of the com-
83 mencement of said action held the said negotiable promissory note of said F. M. Tull, for thirty-four thousand dollars, payable to the order of said P. D. Tull as guardian five years after its date; and that said P. D. Tull and the other defendants in said action were claiming and insisting that the said promissory note was valid and binding, constituting a valid obligation of said F. M. Tull; and that said P. D. Tull threatened that he would negotiate and sell the same to an innocent purchaser so as to cut off any defense said F. M. Tull had thereto, and unless restrained by the order of said court, he would do so.

And further alleging that at the time of the sale of said property by said P. D. Tull by virtue of the order of said probate court, the said P. D. Tull believed that the said property was community property of said F. M. Tull and Lucy A. Tull, deceased, and that the said defendants in said action, William L. Tull, Dora May Dormitzer and Ernest B. Tull, the children of said F. M. Tull and Lucy A. Tull, had inherited a half interest in the property on the death of said Lucy A. Tull; and that the said F. M. Tull also believed that such was the fact, and that a title of the half interest of the said property would thereby become vested in the said defendants, and the sale of said property and its purchase by the said F. M. Tull, and the giving of the said promissory notes, was the result of a mutual mistake

as to the nature of the title, of said defendants in said action, and of the said F. M. Tull, in said property, participated in by both the said P. D. Tull as guardian of said minor defendants, and by said F. M. Tull; that said transactions would never have taken place but for the existence of said mutual mistake.

84 That said F. M. Tull in the said complaint further alleged that the only consideration for the execution and delivery of said notes was the supposed interest of the said minors in said real property; and that said minors had no interest in said property, but the title to the same in fee-simple was at the time of said sale, and always had been vested in said F. M. Tull since its purchase by him; and that the said Lucy A. Tull never had any interest in said property, either as a member of the community of otherwise; and that the said defendants in said action William L. Tull, Dora May Dormitzer and Ernest B. Tull, took no interest as heirs-at-law of said Lucy A. Tull; and that the said promissory note was wholly without consideration and void, constituting no valid or binding obligation against said F. M. Tull.

That said F. M. Tull had not discovered the said mistake concerning the title which led to said transactions, until within two months before the commencement of said action.

And it was further alleged that if notice of a motion for temporary restraining order was given by said P. D. Tull in said action, he would dispose of the said promissory note before hearing, and defeat the object of the said action, and on that account an exigency existed for the granting of a temporary restraining order without notice. And in said action it was prayed that the court would decree said promissory — was made and delivered as the result of a mutual mistake, wholly without consideration, and constituting no valid obligation against said F. M. Tull; and that the court would decree that the said note be placed in its registry and cancelled and delivered to said F. M. Tull, and that said P. D. Tull should

85 be enjoined and restrained in said action from negotiating or disposing of said note. And thereupon this court having jurisdiction in the premises on the 10th day of December 1894, duly made and entered its restraining order in accordance with the prayer of said complaint in said action, enjoining and restraining the said P. D. Tull until the further order of the court, from negotiating, selling, disposing of or in anywise contracting concerning the promissory note described in the complaint so as to prejudice the rights of the plaintiff, to have the same delivered up and cancelled as prayed in the complaint, of which restraining order so issued on the 10th day of December 1894, the said P. D. Tull on said last-named date, was duly notified by the service upon him of a copy thereof and otherwise, which said restraining order still remains unvacated and of force and said action is still pending and undetermined; and that until the termination and adjudication of said action the said plaintiffs in this action, in prosecuting the same are acting in contempt of said restraining order, and should by this court be enjoined and estopped from further prosecuting this action until the final termination of said injunction suit.

86 By way of a third amended answer and defense to all the matters in each of the causes of action in the complaint pleaded, this defendant The German Savings & Loan Society, a corporation, alleges,—

1. That the German Savings and Loan Society is, and at all the times hereinafter mentioned was a corporation, duly organized and existing under the laws of the State of California, with its principal office and place of business in the city of San Francisco State of California; that the said corporation has fully complied with the laws of the State of Washington, relating to foreign corporations transacting business in said State. That at all of said times it was among other objects of this corporation, to engage in and it was engaged in dealing in securities and loaning money secured by mortgages upon real estate in the Territory, now State, of Washington.

2. That on or about the 3rd day of July 1888, defendant P. D. Tull duly petitioned the probate court of Spokane county, Washington Territory, the same being a court of general probate jurisdiction, to be appointed guardian of the persons and estates of Dora May Tull (Dormitzer) William L. Tull, plaintiffs in this action, and said defendant herein Ernest B. Tull, who were each then infants, under the age of twenty-one years; and that on the 24th day of July 1888, such proceedings were had and such showing made that the said probate court duly made its order appointing said P. D. Tull guardian of the persons and estates of the said plaintiffs and the said defendant herein Ernest B. Tull; and that on the 24th day of July 1888, letters of guardianship were by said probate court duly issued to said P. D. Tull, as the guardian of the
86½ persons and estates of the said plaintiffs and the said defendant Ernest B. Tull, and thereupon the said P. D. Tull accepted said trust and immediately qualified and entered upon the duties of said trust, and duly executed his bond with approved security, payable to the State of Washington, in the sum double the amount of the estate of said wards, real and personal, conditioned as by the statutes of the State of Washington in such cases provided, and the said bond was taken and approved by said court; and that the said P. D. Tull has ever since continued to act as such guardian.

3. That the said P. D. Tull as such guardian, has never made, or been called upon or required to make, any settlement of his accounts as such, and the estate and property of the said plaintiffs and the said defendant herein Ernest B. Tull still remains in the possession, custody, management and control of the said P. D. Tull as such guardian, and the real title and ownership to all of the personal property and choses in action of said wards, remains in said P. D. Tull as such guardian.

4. That upon the petition duly made in said probate court of Spokane county in the matter of said guardianship of said wards, such proceedings were had and such proofs were made, that the said probate court duly made and entered its order, directing the said P. D. Tull as guardian aforesaid, to sell at public sale the alleged title, claim and interest of the said plaintiffs and the said defendant

Ernest B. Tull, of, in and to the following-described real estate situate in the city of Spokane, county of Spokane, State of Washington, to wit: An undivided one-half of, in and to that certain piece of
87 real estate commencing at the northwest corner of block 19 in the city of Spokane Falls running thence in a southerly direction along the east line of Stevens street ninety-nine and forty-two one-hundredths feet, thence at right angles in an easterly direction parallel with the south line of Riverside avenue one hundred feet; thence at right angles parallel with the east line of Stevens street in a northerly direction to the south line of Riverside avenue, and thence in a westerly direction along the said last-named line to the place of beginning, being the same property described in paragraph # 12 of plaintiffs' first cause of action. That thereupon as the records of said matters and proceedings show, the said P. D. Tull as such guardian, on the 26th day of November 1888, officially and in writing reported to said court that he had sold the said real estate to F. M. Tull, who was the highest and best bidder at the sale thereof, for the sum of $14,000 in cash, and filed his report of such sale in said court on the 26th day of November 1888, and that on the 27th day of said month upon the motion of said guardian the said sale was by said probate court duly confirmed, and the said P. D. Tull as such guardian was by said court ordered and directed to make a conveyance of the said described real estate to said defendant F. M. Tull; and that the said petition, order of sale, sale, and order of confirmation are the same as those in the plaintiffs' first cause of action set forth; that agreeably to the said order and direction the said P. D. Tull as such guardian duly executed his deed of conveyance whereby he granted, conveyed and transferred to said F. M. Tull, all the alleged rights, title and interest of said wards in and to said premises, and that the same constitutes the guardian's conveyance in plaintiffs' first cause of action pleaded.

5. This defendant is by the complaint informed that said
88 P. D. Tull and said plaintiffs allege that the said F. M. Tull executed and delivered his promissory note to said P. D. Tull as guardian in the sum of $14,000 of date of March 1st, 1889, payable five years from its alleged date, with interest at the rate of ten per cent. per annum, and to secure the payment of the same did execute a mortgage, conveying by way of mortgage to P. D. Tull as guardian, for the purpose of securing said alleged note, all of the premises hereinbefore described in paragraph 4 of this defense of which the said F. M. Tull was then and there the owner in fee-simple, and that the same constituted the mortgage in paragraph # 7 in plaintiffs' first cause of action set forth.

6. That afterwards in the matter of said guardianship in said probate court, on the 12th day of October 1889 said P. D. Tull as such guardian duly filed in said probate court, his petition setting forth the grounds and reasons why the said probate court should sell and dispose of, to the highest bidder for cash, all of the alleged right, title and interest of the said wards in an undivided one-half interest to the following-described parcel of land, to wit: Commencing one hundred feet easterly from the northwest corner of block 19

in said city of Spokane, Washington, running thence along said line of said Riverside Ave. in an easterly direction fifty feet; thence at right angles one hundred eighty feet more or less, to the north line of Sprague street; thence at right angles along said line of Sprague street westerly, fifty feet; thence in a northerly direction and parallel with said Stevens street eighty feet; thence in an easterly direction parallel with the south line of said Riverside avenue ten feet; thence
89 in a northerly direction parallel with said Stevens street to the place of beginning, being the property described in paragraph #11 of plaintiffs' second cause of action. That thereafter such proceedings were had and such proofs were made, that the said probate court on the 12th day of September 1889, duly made and entered its order in said guardianship proceedings, directing the said P. D. Tull to sell said property, and the said P. D. Tull as such guardian, in accordance with said order did sell the same, and that on the 30th day of November 1889, reported to said court in writing that he had sold the same to F. M. Tull for $20,000 in cash, he being the highest and best bidder, and that being the best bid therefor, and that on the 30th day of December 1889, upon motion of said P. D. Tull as such guardian, the said probate court confirmed said sale and order, and directed the said guardian to make a conveyance thereof to defendant F. M. Tull, and that in pursuance of such order the said guardian did execute and deliver to said F. M. Tull a deed purporting to convey to said F. M. Tull all the right, title and interest of the said wards, including the title and interest of the defendant herein Ernest B. Tull, in and to the said premises, and that the said petition, order of sale, sale, order of confirmation and conveyance are the same as those in the second cause of action in plaintiffs' complaint set forth.

7. This defendant is advised by plaintiffs' complaint that afterwards, on the 31st day of December, 1889, at said Spokane, the said defendant F. M. Tull executed and delivered to P. D. Tull, guardian of the plaintiffs and of the said defendant Ernest B. Tull, his promissory note for the sum of thirty-four thousand dollars, payable five years after said date, with interest at the rate of ten per cent. per annum from date of said note until paid, and in order to se-
90 cure the payment of said alleged note, the said defendant F. M. Tull did execute and deliver to said P. D. Tull as such guardian, his certain deed of mortgage, of date December 31st, 1889, wherein and whereby he conveyed to the said P. D. Tull as such guardian, for the security of said alleged note, the following-described premises then owned in fee-simple by the said F. M. Tull, to wit,— Commencing at the northwest corner of block 19 in the city of Spokane Falls, running thence east on the south line of Riverside avenue, 100 ft., thence south parallel with the east line of Stevens street, 99½ ft., thence west parallel with the south line of Riverside avenue 100 ft., thence north on the east line of Stevens street to the place of beginning, and the same constitutes the same mortgage pleaded in paragraph #7 of plaintiffs' second cause of action.

8. That after the said plaintiffs and each of them had attained their majority, and were of full age, they elected to and did ratify each of the said guardian's sales and conveyances aforesaid, their

and each of their right, title and interest in and to the said premises aforesaid and every part thereof, and elected to and did treat the said sale as in all respects regular and valid, and as conveying all their right, title and interest, and their alleged right, title and interest and estate to said premises to the said F. M. Tull and elected to accept and did accept the said alleged promissory notes and the said alleged mortgage security, and in pursuance of said election are prosecuting this action to recover personal judgment against said F. M. Tull, the maker of said alleged notes, for their undivided interest and portion of said alleged promissory notes, and foreclosure of said mortgages given as security therefor, although
91 no partition or division of said alleged notes has been made between them and said defendant Ernest B. Tull, and although no action has been taken by said Ernest B. Tull or by said P. D. Tull as the guardian of said Ernest B. Tull, and although no proceeding of any kind has been had in or by the probate court of said Spokane county adjudicating or in anywise establishing or determining the status of said Ernest B. Tull in relation to the said promissory note and mortgage to secure the same, and although the matter of the estate still remains unsettled and undetermined in the probate court of said Spokane county, although the said P. D. Tull has never been discharged as guardian, and has not settled or adjusted his accounts as such guardian or been required so to do, and although the estate of the said plaintiffs and the said defendant Ernest B. Tull as wards of said P. D. Tull as guardian, remains pending and undetermined in the probate court of Spokane county; but by reason of the continuance of the said guardianship, the unadjusted condition of said estate of said plaintiffs and said defendant Ernest B. Tull as the wards of said P. D. Tull, guardian, are still pending and undetermined in said probate court, but by reason of said premises this court is without jurisdiction or authority to grant the prayer of plaintiffs' complaint or the relief sought therein.

Wherefore, defendant prays that the said mortgage in the first cause of action in plaintiffs' complaint pleaded, given to secure the said fourteen thousand dollars, executed and delivered by the said F. M. Tull to P. D. Tull as guardian, and the said mortgage in the second cause of action pleaded, for the sum of thirty-four
92 thousand dollars, be adjudged to have been paid and to have been lawfully released and discharged of record and that the discharge and release thereof as the same appears in the office of the county auditor of the said Spokane county, be adjudicated to be valid releases and discharges, and that they may each be determined not to be a lien or incumbrance upon the premises in such mortgages described, or any part thereof, and that the relief prayed for in the plaintiffs' complaint be denied, and that they be enjoined from further asserting said mortgages, or either of them, as valid or subsisting liens against the property therein described, or any of it, and that the said action be dismissed at the cost of the plaintiffs.

STRUVE, ALLEN, HUGHES & McMICKEN,
CYRUS HAPPY,
Attorneys for the German Savings and Loan Society.

93 STATE OF WASHINGTON, } ss:
County of Spokane, }

Cyrus Happy, being first duly sworn on oath, deposes and says that he is one of the attorneys for the defendant above named, The German Savings & Loan Society, that he has read the foregoing amended answer of the defendant, The German Savings & Loan Society, knows the contents thereof and believes the same to be true.

That he makes this verification for the reason that he is the attorney for the said defendant, and for the further reason that the defendant, The German Savings & Loan Society, or either or any of its officers or agents, is not in the State of Washington, county of Spokane, and capable of making the same.

CYRUS HAPPY.

Subscribed and sworn to before me this 25th day of August, 1898.

F. E. LANGFORD,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

94 "EXHIBIT A."

STATE OF KANSAS, } ss:
Kingman County, }

In the District Court of said County.

FRANK M. TULL, P'l'ff, }
vs. } Petition.
LUCY A. TULL, Def't. }

Plaintiff complains of the above-named defendant and for cause of complaint alleges.

That on or about the 3rd day of March A. D. 1872 at the residence of defendant's parents in the county of Harrison and State of Missouri the plaintiff and defendant intermarried, and ever since have been and now are husband and wife:

That the plaintiff now is and has been a resident of Kingman county & the State of Kansas for the period of eight years or more immediately preceding the commencement of this action:

And further alleges that during the time he so lived and cohabited with said defendant as his wife, he at all times treated her with kindness, respect & affection; provided for her a good home, and with the necessaries, comforts & luxuries of life, so far as his means would permit.

That the said defendant, disregarding the solemnity of her marriage vow, and her obligation to treat this plaintiff with fidelity, respect & affection, and to protect her own and her husband's honor, by guarding and preserving her own virtue, hath on numerous and divers occasions, at various places, committed adultery and had carnal connection with many persons whose tru- names are to this plaintiff now unknown, and that particularly on or about the —

day of September, 1884, at the city of Kingman in the State
95 of Kansas in the then dwelling of this plaintiff, the said defendant did commit adultery and have carnal connection with one Richard Roe, whose true name is to this plaintiff now unknown.

That each and all of said acts of adultery were committed by said defendant without the consent, connivance, privity or procurement of this plaintiff, and that plaintiff has not voluntarily cohabited with the defendant since he has known of the commission by defendant of the several acts of adultery above complained of.

That the issue of said marriage of plaintiff and defendant are three children whose names and ages are as follows, to wit:

William L. Tull aged 13 years,
Dora M. Tull " 9 years
Benjamin Tull " 4 years.

Wherefore plaintiff prays judgment that the bonds of matrimony between himself and the defendant be dissolved, and that he be awarded the care, custody and control of said children.

F. M. TULL.

96 STATE OF KANSAS, } ss:
Kingman County, }

Frank M. Tull of said county being duly sworn deposes and says that he has heard read the foregoing petition by him subscribed and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated upon his information and belief, and as to those things he believes it to be true.

F. M. TULL.

Subscribed and sworn to before me this 25th day of February 1887.

BION S. HUTCHINS,
Notary Public.

My commission expires Oct. 3" 1887.

ASHBAUGH AND STOCK,
Att'ys for Plaintiff.

We hereby agree to become surety for the payment of all costs that accrue and be adjudged against the plaintiff in the above-entitled cause.

F. M. TULL.
J. F. SPIGER.

Approved and filed by me this 25th day of Febr'y, 1887.

BURT VENABLE,
Cl'k Dist. Court,
By J. H. SMITH, *Dept.*

Service of the within amended answer of German Savings & Loan Society is hereby acknowledged this 25 day of August, 1898.

W. A. LEWIS,
Attorney for Pl'ff Wm. L. Tull.

Filed Aug. 27, 1898, at 9.30 o'clock a. m.

J. R. LOW, *Clerk.*
G. J. DONOVAN, *Deputy.*

Endorsement: Copy. No. 11816. Dormitzer pl't'ff, *vs.* Tull *et al.*, def't. Motion, affidavit, and amended answer. Served 8, 25, '98.

97 STATE OF WASHINGTON, }
County of Spokane. }

In the Superior Court.

DORA MAY DORMITZER and WM. L. TULL, Plaintiffs,
vs.
GERMAN SAVING- & LOAN SOCIETY, a Corporation; Ernest B. Tull, by His Guardian, Wm. M. Murray, *et al.*, Defendants. } No. —. Reply.

The above-named plaintiff- replying to the amended answer of the defendant The German Saving- & Loan Society:

Admits that the defendant, The German Saving- & Loan Society, is a corporation created, existing, authorized to do business, and doing business as alleged in each of the affirmative answers or defenses contained in the said amended answer, reply and defense.

And for reply to the first affirmative defense contained in said amended answer:

1. Admits that the said defendant, F. M. Tull, executed and delivered to the defendant, The German Saving- & Loan Society, a mortgage for forty thousand ($40,000) dollars, mentioned and referred to in the second paragraph of said first answer and defense, and that the said mortgage was discharged and released of record, as therein alleged.

2. Admits that the said defendant, F. M. Tull, executed and delivered to the defendant, The German Saving- & Loan Society, a mortgage for fifty thousand ($50,000) dollars, as alleged in the third paragraph of said first amended answer and defense.

That said mortgage was recorded as therein alleged.

98 3. Admits that the said defendant, F. M. Tull, executed and delivered to the defendant, The German Saving- & Loan Society, a mortgage for twenty-five ($25,000) thousand dollars, as alleged in the fourth paragraph of said first amended answer and defense, and that the same was filed and recorded as in said paragraph alleged.

4. Also admits that the defendant, F. M. Tull, executed and delivered to the defendant, The German Saving- & Loan Society, a mortgage for one hundred thousand ($100,000) dollars, as alleged in

the fifth paragraph of said amended answer and defense, and that same was filed and recorded, as in said paragraph mentioned.

5. Also admits that the defendant, F. M. Tull, executed and delivered to the German Saving- & Loan Society a mortgage for twenty thousand ($20,000) dollars, as in *them* 6th paragraph of said first amended answer and defense, and that same was recorded as therein alleged.

6. The said plaintiffs also admits that the defendant The German Saving- & Loan Society instituted an action for the foreclosure of said one hundred thousand ($100,000) dollar mortgage and twenty thousand dollar ($20,000) mortgage, and that such proceedings were had therein that the premises in said two mortgages described were sold under decree of the court, and that at the sale the defendant, The German Saving- & Loan Society, became the purchaser for the amount due it upon said two mortgages and decree, and is now in possession under and pursuant of such foreclosure and purchase.

7. And the said plaintiffs deny each and every allegation in the said first affirmative answer and defense, not hereinbefore specifically admitted.

The said plaintiffs further replying, and for reply to the second amended answer and defense set forth in the amended answer
99 of said defendant, The German Saving- & Loan Society.

1. Admits that on or about the 3rd day of March, 1870 the said defendant, F. M. Tull and one Lucy A. Tull, were intermarried and became lawful husband and wife, and alleges that they were and remained such husband and wife until the death of said Lucy A. Tull on or about the 18th day of July, 1898, and denies that *he* has any knowledge or information sufficient to form a belief as to all or any of the allegations contained in the second paragraph of said second amended answer and defense down to and including the thirty-second page of the said amended answer, and, therefore, denies each and every of such allegations.

The said plaintiffs further replying to the said second amended answer and defense to the third paragraph thereof:

2. Admits that F. M. Tull converted all his property in the State of Kansas into money and removed with it to the State of Washington, but alleges that said property had been so converted, and the said F. M. Tull had established his residence in the State of Washington in or prior to January 1887.

3. And admits that on June 17, 1887, Jas. M. Glover conveyed to the said F. M. Tull the premises beginning on the south line of Riverside avenue 90 ft. east of the N. W. corner of said block 19, running thence east along said south line of Riverside avenue 90 ft.; thence south 179 ft. more or less to Sprague avenue; thence west along Sprague avenue 80 ft. thence north to the place of beginning.

4. And that on August 19, 1897 said Glover conveyed to said F. M. Tull the following property, beginning at the N. W. corner of said block 19, thence east along the north line of said block 19, 90 ft.; thence south at right angles with said north line 90 ft. more or less; thence westerly parallel with the said north line 90 ft. to the

west line of the said block 19; thence north — said west line to the place of beginning.

100 5. And the said plaintiffs alleges and shows that the contract for the purchase of the said last-mentioned property or premises, was made and entered into by and between the said Glover and the said Tull on the 28th day of December, 1886.

6. And the said plaintiffs denies each and every other allegation contained in said paragraph three of said second affirmative answer and defense.

7. The said plaintiffs further replying to the said second affirmative answer and defense and to the fourth paragraph thereof, denies that *he has* any knowledge or information sufficient to form a belief as to whether or not a divorce was granted between Lucy A. Tull and said F. M. Tull on the 20th day of May, 1887, or at any other time or at all, but, on the contrary, alleges that said Lucy A. Tull and said F. M. Tull were and remained husband and wife from the time of their marriage until the death of said Lucy A. Tull.

8. The said plaintiffs denies each and every allegation contained in paragraph five of the said second affirmative answer and defense.

9. And denies each and every allegation contained in the sixth paragraph of said second affirmative answer.

10. And the said plaintiffs denies that *he has* any knowledge or information sufficient to form a belief as to the facts alleged in paragraph seven of said second affirmative answer and defense, and, therefore, denies the same.

11. And the said plaintiffs also denies any knowledge or information as to the facts alleged in paragraph eight of said second answer and defense sufficient to form a belief, and therefore, denies the same.

101 And the said plaintiffs for further reply to the second amended answer and defense set up in the amended answer of the said German Saving- & Loan Society:

1. Admits that on or about the 10th day of December, 1894, the defendant F. M. Tull, as plaintiff, began action in this court against Dora May Dormitzer, Ernest B. Tull, Wm. L. Tull and P. D. Tull, as guardian, but denies that *he has* any knowledge or information sufficient to form a belief as to whether or not the alleged allegations of his complaint in said action, as stated in the said amended answer in this case, are true or not, and therefore, denies each and every of them, and denies each and every other allegation in the said second affirmative amended answer and defense set forth.

2. And the said plaintiffs for a further reply to said third amended answer and defense alleges and shows: that since the commencement of this action the said suit of F. M. Tull against Dora May Dormitzer, *et al.* has, by an order of this court been dismissed.

And the said plaintiffs demurs to the third affirmative defense alleged and set forth in the amended answer of the defendant The German Saving- & Loan Society, upon the ground:

1. That the said third defense does not state facts sufficient to constitute a defense.

102 Wherefore, plaintiffs pray for the relief heretofore demanded in their complaint.

NASH & NASH,
Attorneys for ——.

103 STATE OF WASHINGTON, } ss:
County of Spokane, }

Dora May Dormitzer, being first duly sworn, upon *his* oath, deposes and says:—

That she is one of the plaintiffs herein. That -he has read the foregoing reply; knows the contents thereof, and verily believes it to be true.

DORA MAY DORMITZER.

Subscribed and sworn to before me this 14th day of September A. D. 1898.

W. A. MONROE,
Deputy County Clerk.

Service of a copy of the within reply accepted this 14th day of September, 1898.

STERN, ALLEN, HUGHES & McMICKEN,
Attorneys for Ger. Sav. & Loan Soc.

Filed Sept. 14, 1898 at 2.15 o'clock p. m.
J. R. LOW, *Clerk.*
J. C. LODGE, *Deputy.*

104 In the Superior Court of the State of Washington in and for the County of Spokane.

DORA MAY DORMITZER and WILLIAM L. Tull, Plaintiffs,
vs.
GERMAN SAVINGS & LOAN SOCIETY, a Corporation; F. M. Tull, P. D. Tuli, Individually and as Guardian of Ernest B. Tull, a Minor; Exchange National Bank, a Corporation; Spokane Falls Gas Light Company, a Corporation; Ernest B. Tull, and J. Grant Hinkle, Defendants. } No. —. Judgment.

Now at this time this cause having heretofore been heard by the court upon the complaint of the plaintiffs, the answers of the defendant, The German Savings & Loan Society, as amended thereto, and the replication of the plaintiffs to such answers and cross-complaint of the minor defendant, Ernest B. Tull, by his guardian *ad litem*, William M. Murray, the answers of the defendant, The German Savings and Loan Society, as amended, to such answer and cross-complaint of said minor defendant, and the replications thereto by said minor defendant by his said guardian *ad litem*; and the court having heard the evidence offered and introduced by the respective parties to said action, and having heard argument of coun-

sel for the respective parties, Messrs. Nash & Nash and W. A. Lewis appearing for the plaintiffs; William M. Murray, Esq., guardian *ad litem* appearing for said minor defendant, Ernest B. Tull, and Messrs. Struve, Allen, Hughes & McMicken and Cyrus Happy appearing for the defendant, The German Savings and Loan Society, and the court having taken said cause under advisement and having duly considered the same, and being sufficiently advised in the premises, upon the findings of fact and conclusions of law made by the court,

It is hereby ordered, adjudged and decreed by the court that
105 the complaint of the plaintiffs, and each of them, be and the same is hereby dismissed, and that the answer and cross-complaint of the said minor defendant, Ernest B. Tull, by his said guardian *ad litem*, be and the same is hereby dismissed as to the said German Savings and Loan Society; that this action be and the same is hereby dismissed upon the merits, and that the defendant The German Savings and Loan Society recover of and from the plaintiffs — dollars, its costs in this action sustained.

Dated this 17th day of May, 1899.

WILLIAM E. RICHARDSON, *Judge.*

Filed May 20, 1899 at 10 o'clock a. m.
JAMES A. DRAIN, *Clerk.*
——— ———, *Deputy.*

106 STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court.

DORA MAY DORMITZER and WILLIAM L. TULL, Plaintiffs,
vs.
THE GERMAN SAVINGS & LOAN SOCIETY, a Corporation; ERNEST B. TULL, *et al.*, Defendants.

It is stipulated by and between the above-named plaintiffs and Ernest B. Tull and the defendant The German Savings & Loan Society, through their respective counsel, that the time prescribed by law for the filing and serving of said plaintiffs' and Ernest B. Tull's proposed statement of facts on the appeal of this action to the supreme court of the State of Washington, be enlarged, and that said plaintiffs and Ernest B. Tull have up to and including the 10th day of July, 1899, within which to file and serve their said proposed statement of facts on said appeal.

Dated this 13th day of June, 1899.

STRUVE, ALLEN HUGHES & McMICKEN,
CYRUS HAPPY,
Attorneys for the German Savings & Loan Society.
NASH & NASH,
Attorneys for the Plaintiffs and Ernest B. Tull.

Filed June 14, 1899, at 2.20 o'clock, p. m.
A. J. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

107 STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court.

DORA MAY DORMITZER and WILLIAM L. TULL, Plaintiffs,
vs.
THE GERMAN SAVINGS & LOAN SOCIETY, a Corporation; Ernest B. Tull, *et al.*, Defendants. } No. 11816.

To the defendant The German Savings & Loan Society, a corporation, and to Struve, Allen, Hughes & McMicken and Cyrus Happy, its attorneys:

Take notice that the plaintiffs herein Dora May Dormitzer, William L. Tull and Ernest B. Tull defendant- in the above-entitled action hereby appeal to the supreme court of the State of Washington from the judgment therein rendered and entered in the superior court of the State of Washington in and for Spokane county, on the 20th day of May, 1899, in favor of the defendant The German Savings & Loan Society and against the plaintiffs and Ernest B. Tull and from the whole of said judgment.

Dated August 17th, 1899.

NASH & NASH,
Attorneys for Plaintiffs and Ernest B. Tull.

Service of the foregoing notice by a true copy thereof accepted this 17th day of August, 1899.

STRUVE, ALLEN, HUGHES & McMICKEN,
CYRUS HAPPY,
Attorneys for the German Savings & Loan Society.

Filed Aug. 17, 1899, at 4.40 o'clock p. m.
JAMES A. DRAIN, *Clerk.*
R. A. KOONTZ, *Deputy.*

108 STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court.

DORA MAY DORMITZER and WILLIAM L. TULL, Plaintiffs,
vs.
THE GERMAN SAVINGS & LOAN SOCIETY, a Corporation; Ernest B. Tull, *et al.*, Defendants. } No. 11816.

Know all men by these presents that we Ernest B. Tull, by his duly appointed and acting guardian *ad litem*, William M. Murray, Dora May Dormitzer, and William L. Tull, by their attorneys-at-law, as principals, and Charles Russell and John Bigham, as sureties,

are held and firmly bound unto The German Savings & Loan Society, a corporation, its assigns or successors in the sum of two hundred ($200.00) dollars, for the payment of which well and truly to be made, we and each of us hereby bind ourselves jointly and severally, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 21st day of August, 1899.

The condition of this obligation is such, that whereas, said Ernest B. Tull, Dora May Dormitzer and William L. Tull, have appealed to the supreme court of the State of Washington, from the judgment and decree entered in the above-entitled action, on the 20th day of May, 1899, and from each and every part thereof.

Now therefore, if said Ernest B. Tull, Dora May Dormitzer and William L. Tull, appellants, shall pay all costs and damages
109 that may be awarded against them on appeal, or on the dismissal thereof, not exceeding two hundred ($200.00) dollars, then this obligation to be void, otherwise to remain in full force and effect.

ERNEST B. TULL,
By WM. M. MURRAY,
His Guardian ad Litem. [SEAL.]
WILLIAM L. TULL AND [SEAL.]
DORA MAY DORMITZER,
By NASH & NASH,
Their Attorneys-at-law.
JOHN BIGHAM. [SEAL.]
CHARLES RUSSELL. [SEAL.]

STATE OF WASHINGTON, } ss:
County of Spokane, }

Charles Russell and John Bigham, being first duly sworn, each for himself and not one for the other, on oath, says:—That he is a resident of and freeholder in the county of Spokane State of Washington; that he is not a counsellor-at-law, attorney-at-law, sheriff, clerk of the court or other office- of the superior court, and that he is worth the sum mentioned in said bond as the penalty thereof, to wit:—the sum of two hundred ($200.00) dollars, over and above all debts and liabilities, and exclusive of property exempt from execution.

CHARLES RUSSELL.
JOHN BIGHAM.

Subscribed and sworn to before me this 21st day of August, 1899.

[NOTARIAL SEAL.] FRANK C. NASH,
Notary Public, Residing at Spokane, Washington.

Filed Aug. 21, 1899 at 5 o'clock p. m.

JAMES A. DRAIN, *Clerk.*
R. A. KOONTZ, *Deputy.*

110 DORA MAY DORMITZER ET AL., Plaintiff-,
vs.
GERMAN SAVINGS & LOAN SOCIETY ET AL., Defendant-.

On this 16 day of November, 1899, this cause came regularly on for hearing by the court on Dora May Dormitzer, William L. Tull and Ernest B. Tull's motion and application for an extension of time in which to file and serve briefs on the appeal of this action to the supreme court of the State of Washington, and after hearing said motion and the argument of counsel, and the court being fully advised in the premises, it is by the court.

Ordered that said Dora May Dormitzer, William L. Tull & Ernest B. Tull have 40 days from the date hereof to file and serve their briefs herein on their appeal to said supreme court.

WILLIAM E. RICHARDSON, *Judge.*

Filed Nov. 16 1899 at 9.45 o'clock a. m.
JAMES A. DRAIN, *Clerk.*
FRED W. LUELLING, *Deputy.*

111 In the Superior Court of the State of Washington in and for Spokane County.

DORA MAY DORMITZER and WILLIAM L. TULL, Plaintiffs,
vs.
THE GERMAN SAVINGS AND LOAN SOCIETY *et al.*, Defendants.
No. 11816. Before Hon. W. E. Richardson, Judge.

Transcript of Testimony.

Filed Jul- 10 1899 at 3.20 o'clock p. m.
JAMES A. DRAIN, *Clerk.*
E. G. DRAIN, *Deputy.*

112 STATE OF WASHINGTON, *County of Spokane,* ss:

In the Superior Court.

DORA M. DORMITZER ET AL., Plaintiffs,
vs.
THE GERMAN SAVINGS & LOAN SOCIETY ET AL., Defendants.
No. 3528.

Filed Feb. 19 1900
C. S. REINHART, *Clerk,*
By R. B. CRANDALL, *Deputy.*

Proposed statement of facts of the plaintiffs herein and Ernest B. Tull, on appeal, consisting of pages 1 to 365 inclusive.

NASH & NASH,
Attorneys for Plaintiffs and Ernest B. Tull.

A copy of this proposed statement of facts accepted this 10th day of July, 1899.

STRUVE, ALLEN, HUGHES & McMICKEN,
HAPPY, HINDMAN & LANGFORD,
Attorneys for Defendant The German Savings & Loan Society.

3.45 p. m.

113 In the Superior Court of the State of Washington in and for Spokane County.

DORA MAY DORMITZER and WILLIAM L. Tull, Plaintiffs,
vs.
THE GERMAN SAVINGS AND LOAN SOCIETY *et al.*, Defendants.

No. 11816. Before Hon. W. E. Richardson, Judge.

Transcript of Testimony.

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116 In the Superior Court of the State of Washington in and for Spokane County.

DORA MAY DORMITZER and WILLIAM L. Tull, Plaintiffs,
vs.
THE GERMAN SAVINGS AND LOAN SOCIETY, F. M. Tull, P. D. Tull, Individually and as Guardian; Exchange National Bank, a Corporation; Spokane Falls Gas Light Company, a Corporation; Ernest B. Tull, and J. Grant Hinkle, Defendants.

Before Hon. William E. Richardson, Judge.

This cause coming on for trial on this 14th day of September, in the above-entitled court, at Spokane, Washington, before the Honorable William E. Richardson, judge, the plaintiffs appearing by Messrs. Nash & Nash, and W. M. Murray, Esq., and W. A. Lewis, Esq., their attorneys, Messrs. Happy, Hindman & Langford and Messrs. Struve, Allen, Hughes & McMicken appearing as attorneys for the defendant The German Savings and Loan Society, the following proceedings were had and testimony taken, to wit:

The defendant, The German Savings and Loan Society, asked for leave to file an amended answer to the complaint, and also an amended answer to the answer and cross-complaint of the guardian *ad litem*.

The COURT (after argument of counsel): I will allow the filing of these two answers. The order may provide that the former ruling of this court on a demurrer to certain parts of this answer that have already been referred to shall stand as the ruling of the court at this time upon the same propositions contained in the amended answer. Counsel may indicate what course they desire to take with reference to a reply to the amended answer.

Mr. MURRAY: So far as my part of the case is concerned I would like to have the order provide that the original reply stand as a reply to this case, so far as it is applicable, and that I may file a further reply if I shall be so advised, and I will be ready to
117 do that by opening of court this afternoon.

Mr. HAPPY: There is no objection to that.

Mr. HUGHES: There is no objection, and the order may further provide, to save trouble, that it shall stand as a denial of any matters in the amended answers.

Mr. L. B. NASH: I will ask the court if he will impose any terms?

The COURT: No, I do not think it is a case for terms. What course do you wish to take with reference to your part of the case?

Mr. L. B. NASH: We will file an issue and take exception to the ruling of the court. That, I suppose, goes in the case all along. We shall try to get in the pleadings as soon as we can.

The COURT: Before we proceed with the trial the court must be advised with reference to what plaintiff wants to do in reference to her reply. Judge Murray has indicated that he will allow his reply

to stand, in so far as it is applicable, and that he will file a new pleading.

Mr. L. B. NASH: We shall want to do likewise.

The COURT: Will you file that by the incoming of court this afternoon?

Mr. L. B. NASH: Yes, sir. The preparing of the order in this case will be done by the gentlemen on the other side?

Mr. HUGHES: We will prepare the order and submit it to you at the incoming of court this afternoon. Before recess let me understand from counsel whether we shall incorporate in that order the further provision in respect to the reply.

The COURT: No, I think not. Counsel will take their own course in that matter.

Mr. L. B. NASH: I think we can agree that the reply shall stand, as far as applicable, and that we will have opportunity to make further reply.

Mr. HUGHES: I took it for granted you prefer to have it incorporated in the order.

118 Mr. L. B. NASH: Yes, I prefer to have the whole thing incorporated in one order with an exception to everything that has been done.

Thereupon a recess is taken to 2 o'clock this afternoon.

SEPTEMBER 14, 1898—2 o'clock p. m.

Court convening pursuant to adjournment, the trial of the case proceeded as follows:

Mr. HUGHES: We have prepared an order which has been submitted to opposing counsel and meets their approval (handing paper to court). If the court please, before proceeding with the introduction of proof on the part of the plaintiff and the cross-complainant, I think that the trial will be greatly simplified if the court will at this time construe the complaint. The complaint appears to be drawn with a double aspect, and it is apparent, or will be upon mere investigation of the complaint by the court, that one of these aspects must be taken as the cause of action waged by the plaintiffs in this case. In other words, that if the plaintiffs insist upon the one, the other would be inconsistent with it, and they could not stand side by side; and if we go into the trial of the case and take the proofs, without the court having construed the matter in advance, we will be at a loss to know what testimony is immaterial and irrevelant, and what is material and relevant to the real issue that is being waged. The court will see by an examination of the complaint that plaintiffs set out a mortgage, allege that it was fraudulently satisfied on the record, that defendant had knowledge of that fact and that it is still in full force and effect, unpaid, unsatisfied and undischarged; that it is prior and paramount to the lien of the defendants, other than Ernest B. Tull, who is equally interested with the plaintiffs, and ask that it be foreclosed; and they also set out facts which would tend to establish that they are the

119 owners of this same property. Of course, they cannot sue as the owners of the property and ask for a foreclosure of the

mortgage upon it. It is needless to say that our supreme court has several times held that in an action of foreclosure a question of paramount title cannot be tried. It is probable that the plaintiffs have their own clear and well defined notions of what is the cause of action they are waging, and while we feel that we understand what their cause of action is, there might be room for confusion. As I have suggested, the evidence might necessarily take a very wide range and protract this trial unduly. And, morever, if it should take a range which involved the trial of a case of a nature inconsistent with that which we assume to be the cause of action that the plaintiffs are really waging, we, in the trial of the case, might not be prepared with the testimony to meet a different cause of action from that which we assume is the cause of action of the plaintiffs. Therefore, I think it is the proper course to have the nature of this action determined at this time, and that it will save very much time, and that it is the orderly method of procedure.

Counsel for the respective parties argued the motion and cited authorities to the court, and before the conclusion of the argument court adjourned to 10.30 o'clock tomorrow, September 15, 1898.

SEPTEMBER 15, 1898—10.30 o'clock a. m.

Court convening pursuant to adjournment the trial of the case proceeded as follows:

The argument was resumed by counsel and concluded.

The COURT: It is probably not necessary for the court to rule upon this motion at this time, but in view of the importance of the question presented to the court I wish to take some time to consider the matter, and I will take this question under advisement at this time until 3 o'clock this afternoon, and we will be at recess so far as this case is concerned until then.

120 Mr. HAPPY: Before the court takes a recess I want to call your honor's attention to another matter that perhaps might be decided at the same time. The one suggested by Mr. Hughes relates to the guardian *ad litem*.

Mr. HUGHES: I suggested to your honor that we would keep that separate and we would make another motion as to that. We simply want to make a formal motion, and there is just one proposition that I want to call attention to, that stands in slightly different character.

The COURT: I will suggest to you that I think a formal ruling of the court upon the question now presented is not proper at this time, and must necessarily be made upon some objection to the introduction of testimony in the case. In other words, that the ruling of the court upon this motion would be rather advisory than otherwise to counsel in the case; it would not be a square ruling upon any legal point arising.

Mr. HUGHES: That was our idea, but we thought in advance if it could be determined as advisory it would relieve both parties very greatly in the matter of marshalling their testimony.

The COURT: Yes, sir.

Mr. HUGHES: The defendant, The German Savings and Loan Society requests the court to construe the pleading of the guardian *ad litem* in its answer and cross-complaint, to determine at this time before entering upon the trial of the cause, whether it shall be treated as a cross-complaint joining with the plaintiff in seeking the foreclosure of the mortgage, or whether it shall be treated as a cross-complaint asserting title to a portion of the premises in controversy.

And the defendant also moves that the guardian *ad litem* be required at this time to elect, if it be determined by the court that this pleading does not elect, which of said causes he desires to prosecute in his said cross-complaint.

121 Mr. HAPPY: The German Savings and Loan Society, by its attorneys, moves for judgment on the pleadings as to the first cause of action alleged in this complaint, on the ground that the note and mortgage described in the first cause of action are shown by the plaintiffs' complaint to have been merged in and satisfied by the giving of the note and mortgage described in the second cause of action. We desire to make this motion apply also to the answer and cross-complaint of the guardian *ad litem*.

In support of said motion counsel refers the court to paragraph 22 of plaintiffs' complaint.

Mr. MURRAY: I move that the defendant, The German Savings and Loan Society be required to elect as to whether they will stand upon the second defense set up in their answer, or upon the fourth one. They are inconsistent.

The COURT: I think the court better reserve the decision upon that motion and reserve any argument upon it until after the coming in of court this afternoon, when we will hear you upon that. I do not want to consider too many motions at the same time.

Thereupon an adjournment is taken to 3.00 o'clock this afternoon.

SEPTEMBER 15, 1898—3 o'clock p. m.

Court convening pursuant to adjournment the trial proceeded as follows:

The COURT: Referring to the question presented to the court before the adjournment this morning, the question arising upon the several motions made upon the part of the defendant The German Savings and Loan Society, in this case, I have examined into the question as thoroughly and as carefully as the time limited would allow, and I am of the opinion that the motion should be granted. It remains a very serious question in this case whether the plaintiffs having asked for a foreclosure of the mortgage set out and

122 described in the complaint, have not made an election in that respect so that they are bound to proceed upon the theory of a mortgage foreclosure. If that is the case, and if they were bound to elect between two inconsistent remedies, the election has already been made by the plaintiffs in their complaint, and by the guardian *ad litem* in his cross-bill, provided, it be the law that a guardian can make such an election, or has the power to do so—and my present

view of the law upon that subject is that he can. However that may be, this is an equitable action, and the court ought to take such course in the matter as that, when the case is finally decided by this court and decided by the supreme court of this State, on appeal, that the case will be finally disposed of, and that a new trial will not be necessary. If the court should rule upon this motion favorably to the defendant, The German Savings and Loan Society, and the supreme court should be of the opinion that the ruling was erroneous, it would necessitate a new trial of this action. In view of the fact that the court will still have an opportunity to consider this question upon the final argument of the case, I have decided to admit the testimony indicated by the plaintiffs in their argument of this motion, subject, of course, to possible change of the ruling of the court upon this question, upon the final argument of the case.

Mr. HAPPY: We take an exception to the ruling of the court.

The COURT: An exception is allowed.

Mr. HAPPY: I did not understand your honor to rule as to the motion with respect to the first cause of action. The difference between the first cause of action and the second cause of action is a $14000 note secured by a $14000 mortgage, satisfied; the second cause of action alleging that that note and mortgage are merged in the cause of action set out in the second cause of action. As to all other facts relating to the two causes of action there is no difference, I believe, so far as I recollect.

123 The COURT: I do not remember the exact terms of your motion with regard to that first cause of action.

Mr. HAPPY: It was a motion for judgment on the pleadings.

The COURT: The motion for judgment on the pleadings made by the defendant, The German Savings and Loan Society, is overruled.

Defendant excepts.

Mr. MURRAY: In view of the information which your honor must already have in reference to the nature of this case, and the line of proofs, if not the detail, I think it hardly necessary that I should occupy any time in making a statement of what we expect to prove. I think we may in safety proceed to offer the proofs, and we shall begin at the starting point of this whole thing and present the case, in offering proofs, from what seems to us to be the logical order of the facts as they occurred, in order to enable the court to get it as clearly as he can in his mind in the order in which the events occurred, not perhaps always as to time, but as to the legal effect of them at least, and in the main as to the chronological order. I don't think I need waste any time in going into all of the details.

124 F. M. TULL, a witness called on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. MURRAY:

Q. Mr. Tull, what is your full name and residence?

A. Francis Marion Tull, residence Spokane.

Q. Are you the F. M. Tull mentioned in the pleadings in this case and who is a party to the action?
A. Yes, sir.
Q. You are acquainted with Lucy A. Tull in her lifetime?
A. Yes, sir.
Q. What was your relationship to her?
A. She was my wife.
Q. When were you and she married, and where?
A. I think it was in 1871, March 2, 1871, as near as I remember it, in Missouri.
Q. When did Lucy A. Tull die, and where, if she is dead?
A. July 18th, I believe, 1888, in Spokane.

(By Mr. HAPPY:)

Q. July 18th?
A. July 18, 1888. That is my recollection now. I might not be exact now, 17th or 18th, somewhere in that neighborhood.

(By Mr. MURRAY, resumed:)

Q. From the time of your mar-iage until you removed to Spokane, where did you live?
A. I lived in Missouri and Kansas.
Q. What if any property had you and she at the time of your marriage?

Defendant objects on the ground that it is irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Why, I don't think I had any property to speak of. Perhaps worth $100 would cover it all.
Q. And what had she?
A. She hadn't anything.
Q. None whatever. During your residence in Missouri and Kansas and while you were living together as husband and wife, state whether or not you acquired some property?
A. Yes, sir.
Q. When did you, yourself, first come to Spokane?
125 A. December 24, 1886.
Q. While you were here what then did you do in reference to acquiring property and making arrangements to take up your residence here?

Defendant objects as irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Why, I bought—contracted and made a payment on the property——
Mr. HAPPY (interrupting): Let me ask a preliminary question.

(By Mr. HAPPY:)

Q. Was that contract in writing?
A. Yes, sir.

Mr. HAPPY: We object to his stating orally anything in reference to any contract.

Mr. MURRAY: I am merely asking him the fact as to what he did. I have the contract here and I am going to offer it. It would be proper for him to state he made a contract preliminary to my offer. That is all. I don't care very much whether he answers it or not.

Objection overruled.

Mr. HUGHES: I suggest, for the purpose of saving time and avoiding incumbering the record, that whenever objections are made by either party and ruling had by the court, that the stenographers shall enter an exception as allowed to the party against whom the ruling is made.

Mr. MURRAY: That is satisfactory to us.

Mr. HUGHES: I suppose the court will allow an exception to his ruling anyhow.

The COURT: There is no objection to that course. I think the statute provides that an exception is given where an objection is made.

A. I bought, contracted, as I say for the——

Q. (Interrupting.) Never mind that. You made a contract for some property here?

A. I made a contract for the property that the Tull block stands on today.

Mr. MURRAY: If the court please, I offer in evidence a cer-
126 tified copy of the record of a contract made on the 28th day of December, 1886 between James N. Glover and Susan T. Glover his wife, of the city of Spokane, and F. M. Tull, of Kingman, in the State of Kansas, whereby James N. Glover and wife agreed to convey to F. M. Tull lots 5 and 4 and the west half of lot 3 in block 19, town of Spokane Falls, according to the resurvey thereof on file. This covers about one-half of the premises in question. It covers 50 or 60 feet running through from Riverside avenue to Sprague avenue, and covers a part of the premises. The contract was executed before Mr. Kinnard and myself as witnesses on the date which I have named, acknowledged before Mr. Kinnard on the same day as notary public, and was recorded in the office of the auditor of this county on the 17th day of January, 1887.

Defendant- objects to the paper as being irrelevant and immaterial in a foreclosure proceeding, when Mr. Tull bought the property. Objection overruled. Defendant- excepts.

The paper is received in evidence and marked Pl'ffs' Ex. "1." See instrument on page 334.

Q. Mr. Tull, while in Kansas and up—well, what town and county did you reside in in Kansas?

A. Kingman town, Kingman county.

Q. What was your business there?

A. Furniture business.

Q. What was the general nature of the property which you owned there?

A. Furniture stock and some real estate.

Q. Real estate. Prior to your visit to Spokane, at the time when you made this contract, what, if anything, had you done in reference to disposing of your business and property with a view of removing from Kansas?

A. I had sold out everything.

Defendant- objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant- excepts.

Mr. MURRAY: That tends to prove some of the allegations in their defense.

A. (continued). I had sold out my business and real
127 estate with a view of hunting a location before I left home. I did not know where I would locate when I left home. I went to California first.

Q. Prior to leaving home state whether or not you had disposed of your business and most of your property?

A. All of it.

(By Mr. HAPPY:)

Q. That is, prior to December, 1886?

A. Yes, sir.

(By Mr. MURRAY, resumed:)

Q. What was your purpose on your trip, first to California, and subsequent trip to Washington and Spokane?

Defendants object as irrelevant, incompetent and immaterial. Objection overruled. Defendants except.

A. I sold out my business and started out to hunt a new location. I went to southern California and up to San Francisco and around Seattle and Tacoma and Portland, and landed here and bought—made this purchase and located here.

Q. What was your purpose when you purchased property here in Spokane as to making this your place of residence?

Objected to as irrelevant, immaterial and incompetent. Objection overruled. Defendants except.

A. I decided to locate here and came back here as soon as I could get here.

Q. After making the contract which has been introduced in evidence, what did you then do in reference to making the change from Kansas to here?

Same objection. Same ruling. Defendants except.

A. I went back to Kansas and wound up my affairs there preparing to come here as soon as I could get here.

Q. When did you afterwards return here?

A. I couldn't tell, but some time in the spring——

Defendants object as incompetent, irrelevant and immaterial. Same ruling. Defendants except.

A. (continued). Some time in the early spring.

The COURT: Mr. Witness, you must give the attorneys time
128 to object.

The WITNESS: Yes, sir, I will do that.

Q. When you returned here in the early spring what did you do as to erecting buildings upon the property which you had bought?

Defendants object as immaterial. Same ruling. Defendants except.

A. Well, I commenced to erect a brick block there, which I had contracted for the brick for the block when I was here the first time, before I went away, with Mr. Brock, as soon as he could burn them. I could not get a brick until he could burn them in the spring, and as soon as he could get them burned, possibly, I was here ready to go ahead with the building.

Q. I understood you to say that you had contracted for the brick when you were here the first time?

—. Yes sir.

Q. Now state, as near as you can, when you returned and commenced the erection of your building. If you can state the date, state the month or the date as near as you can judge.

Defendants object as irrelevant, incompetent and immaterial. Same ruling. Defendants except.

A. I could not state the date. I was here two or three times, and I came here I think in March, and then went away again and then came back; went east again. I think I was here at least two or three times that spring before I was ready to go ahead with the building on account of brick—waiting for the brick to be burned; I did not stay—at the second or third time——

Q. That was in the early part of the year, January, February, March or April?

Defendants object to the question as leading. Objection sustained. Plaintiffs except.

Mr. HAPPY: We are dealing with the Tull family in this State and I shall insist that counsel shall not resort to leading questions to get the evidence that they want, especially when they are examining one of the Tull family.

129 Question withdrawn.

Q. Now, when your wife died, in July, 1888, how many children did you and she have? Give their names, their ages, or the dates of their birth as nearly as you can.

A. We had three. The present ages I can give; I could not give the ages at that time without figuring up closely. I can give you it approximately.

Q. Well, give their present ages, then.

Mr. MURRAY: I think it is conceded all the way through in the pleadings that they were all minors.

Mr. HAPPY: There will be no controversy, I suppose, about their names or ages?

Mr. MURRAY: Yes, there is a denial, when you call my attention to it, in their answer, as to any knowledge or information as to whether she left these three children, or as to their names or their ages.

A. About 15, 11——

Q. (Interrupting.) Give the eldest one first.

A. William L. Tull was about 15, between 14 and 15, I think.

Q. You are speaking of the time when your wife died?

A. Yes, sir; he was about 14; maybe a little bit over.

Q. The next one?

A. The next one, Dorothy May, was about 10.

Q. And the other one?

A. About 4 I think.

Q. Ernest B. about 4?

A. About 4.

Q. State whether or not your wife, Lucy A. Tull left any other children except these three?

A. No, sir.

Q. Where were these children and with whom were they residing at the time of the death of Lucy A. Tull?

A. I had them home; we were keeping house when she died.

Q. Keeping house here in Spokane?

A. Yes, sir.

Q. Now, about Dora May Tull, has she been married?

A. Yes, sir.

130 Q. What is her present name?

A. Dormitzer.

Q. Dora May Dormitzer?

A. Yes, sir.

Q. To whom was she married and when?

A. Well, I could not tell you; they ran off and got married; I couldn't tell you; they were supposed to be married—of course they were—I have not seen any record of marriage.

Q. They assumed to be married and lived together?

A. They were married in Rathdrum, Idaho. I don't know by whom.

Q. Your daughter, Dora May Tull is the same person who is plaintiff in this suit as Dora May Dormitzer, is she not?

A. Yes, sir.

Mr. MURRAY: I now offer in evidence a certified copy of a warranty deed, certified copy from the record of warranty deeds, from James N. Glover and Susan T. Glover, his wife, to F. M. Tull, all of Spokane, dated June 17, 1887, executed before J. M. Kinnard and W. M. Murray as witnesses, acknowledged before Kinnard as notary public and recorded in the auditor's office of Spokane county, on the 30th day of June, 1887, at 9 o'clock in the forenoon, in Book "Q" of Deeds, page 167. That deed conveys the same property described in the contract.

Defendants make the same objection to this deed that they did to the admission in evidence of the contract. Objection overruled. Defendants except.

The paper is received in evidence and marked Pl'ffs' Ex. "2." See instrument page 339.

Mr. MURRAY: I next offer in evidence a certified copy of the record of a deed from James N. Glover and Susan T. Glover, his wife, to F. M. Tull, all of Spokane, dated the 19th day of August, 1887, executed before Will*l* H. Zeigler and J. M. Kinnard as witnesses, acknowledged before Kinnard as notary public, and recorded on the 22nd day of August, 1887, in Book "Q" of Deeds, page 362. That deed covers the corner upon which the Tull block stands, 90 feet on Riverside avenue and 99 feet on Stevens street.

131 Defendants object to its admission as irrelevant and immaterial. Objection overruled. Defendants except.

The paper is received in evidence and marked Pl'ffs' Ex. "3." See instrument page 343.

Q. After your purchase of this property described in these two deeds and in this contract, and after your removal here, what, if anything did you do in the way of erecting buildings upon the property?

Defendants object as irrelevant, incompetent and immaterial. Objection overruled. Defendants except.

A. I erected two separate buildings at two different times, enough to cover the whole frontage of the whole property.

Q. What buildings had been erected upon this property in July, 1888, when your wife died?

A. The first building I built was 50 feet, three stories high, by 100. That is where I opened my furniture business at, and after that I commenced the erection of a bank building that burnt down on the corner, which was partly constructed when she died, was under construction; I think had the foundation and a part of one story up; was under construction at the time of her death.

Q. The furniture building had been completed and was occupied?

A. That was built about a year before.

Q. What was the size of that furniture building?

Defendants object as incompetent, irrelevant and immaterial. Objection overruled. Defendants except.

A. The first building was 50 by 100 three stories high; that was built in 1887. I commenced the erection of the balance remaining of the 100 feet that was built on the upper side to the corner and had 100 feet of land left, and I had commenced the erection of another building which was partly—well, I don't know exactly what stage it was at, but the foundation and one story going on the second story, I think, when she died, to cover the remainder of the frontage of the Riverside property, making 150 feet front in all.

132 Q. Who is P. D. Tull?

A. A brother of mine.

Q. A brother?
A. Yes, sir.
Q. Where does he reside and where did he reside in 1888 and ever since?
A. In 1888?
Q. Yes.
A. In Spokane.
Q. He resides here yet and has ever since, has he not?
A. Yes, sir.
Q. Have you ever at any time, or has there ever at any time, been an administrator appointed on your wife's estate?

Objected to by defendants as immaterial and irrelevant.

Q. Or an application made for it?

Objected to by defendants on the ground that it is leading and immaterial, the record itself being the best evidence. Objection sustained. Plaintiffs except.

The COURT: I think the last objection is probably a good one. I think that can be proved by the record.
Mr. MURRAY: I can ask him whether or not he ever made an application for the appointment of an administrator of his wife's estate.
Mr. HUGHES: We object to that as immaterial, irrelevant and incompetent, the record being the best evidence.
Mr. MURRAY: I think the record is not evidence as to the mere fact. If we wanted to prove what the record contained the record would be the best evidence.
The COURT: The objection is sustained.
Plaintiffs except.

Q. (Handing witness paper.) I ask the witness to look at this paper. Look at this signature here and this one down here and tell the court whose signatures they are.
A. I only know my own signature.
Q. The first one, whose is the first signature your attention was called to?
133 A. Well, there is P. D. Tull's signature here. I know my own.
Q. You don't know the other one?
A. No, sir, I would not.
Q. The last one is yours?
A. Yes, sir; it looks like his, but I would not identify it.

Mr. MURRAY: I offer in evidence from the files of this court the petition for the appointment of guardian for the three children that have been spoken of. The petition is signed by P. D. Tull as petition-, made by P. D. Tull, verified by him, and annexed to it is this signature which Mr. F. M. Tull recognized as his; (reading) "F. M. Tull having read the foregoing petition says that he is the F. M. Tull therein referred to, and the father of the minors therein named, and requests that petitioners said P. D. Tull may be ap-

pointed guardian of said minors." I offer this in evidence, the entire paper.

The same is received without objection, marked Pl'ffs' Ex. "4." See instrument on page 346.

Mr. MURRAY: I next offer in evidence an order of the probate court, made July 23rd, 1888, signed "Millard T. Hartson," appointing P. D. Tull guardian of those infants.

The same is received without objection and marked Plaintiffs' Exhibit "5." See instrument page 349.

Mr. MURRAY: I next offer a bond, the usual guardian's bond, given, executed, filed and approved July 23, 1888, executed by P. D. Tull as principal and by F. M. Tull and H. C. McCammant, as sureties. This was approved the same day the sureties justified, by the probate judge. This is a bond in the penal sum of $9600.

The same is received without objection and marked Pl'ffs' Ex. "6." See exhibit at page 350.

Mr. MURRAY: I next offer letters of guardianship granted by Judge Hartson, probate judge, on July 24, 1888.

The same are received without objection and marked Pl'ffs' Ex. "7." See exhibit at page 353.

Q. Mr. Tull, in these proceedings for the appointment of
134 guardian who was the attorney in these proceedings for the appointment and in all the subsequent proceedings in that matter?

Objected to by defendants as irrelevant, incompetent and immaterial, and because the record would be the best evidence.

Mr. MURRAY: I next offer in evidence from the records what purports to be an inventory filed in the matter of said guardianship. This is an inventory signed by P. D. Tull and by Houghton, Graves & Jones, attorneys for said guardian, and if counsel will not object to my testifying, I will tell the whole story. It is verified by P. D. Tull before Frank H. Graves as notary public, and it is his seal as notary public, and I will call attention without reading it to the fact——

Mr. HUGHES: Do not call attention until we see whether we want to object first.

The paper is received without objection and marked Pl'ffs' Ex. "8." See exhibit at page 355.

Mr. MURRAY: There seems to have been no appraisers. It is simply an inventory made by P. D. Tull himself, in which he returns, among other things, the real estate which is in controversy here, and returns the entire value of — at $40,000, and no more than that. He returns the value of the 50 feet running through from Riverside to Sprague, at $40,000, and the other piece at $30,000. The value of one piece is $40,000, subject to mortgages of $20,000, and the other, $30,000, making a clear value, independent of the mortgage, $50,000 for the two pieces.

We now offer in evidence, from the files of the probate court, the petition to sell real estate, made by P. D. Tull, as guardian for said

minors, verified by him, filed in the probate court August 1, 1888, in which, after setting forth a good many other things, he asks—I don't know as I care to read it all.

The COURT: Is there any objection?

Mr. HAPPY: If the court please, I want to interpose an ob-
135 jection here. I suppose that perhaps the object of introducing this petition here and the inventory just offered is for the purpose of trying to show title in Mrs. Tull to a part of this property and in these children. Now, of course, while we are not disposed to unnecessarily take up the time of the court in raising or arguing objections, we don't want these papers to go in evidence in such a way as to commit us in any manner to the competency of that evidence for the purpose of proving title. They cannot prove title in that way, and for that reason we wish to interpose an objection to the inventory, merely for the purpose of keeping our records straight. We object to the inventory which has just been introduced on the ground it is irrelevant, incompetent and immaterial. It does not support the complaint for the foreclosure of the mortgage and is not evidence of title of real estate in these wards, and the court can rule on that, and then I propose to raise an objection to this petition.

The COURT: The objection to the inventory is overruled. Defendants except.

Mr. MURRAY: While the subject is up, I do not wish to go unchallenged the statement of Mr. Happy that this is not any evidence of title. I insist it is evidence of title.

The COURT: We will let that go until the final argument in the case.

Mr. HAPPY: We object to the petition of the guardian to sell, which is offered in evidence for the same reason. We offer the same objection to that that was made to the inventory, and for the same reason.

The objection is overruled. Defendants except.

The paper referred to is received in evidence and marked Pl'ffs' Ex. "9." See Ex. at page 358.

Mr. MURRAY: That petition represents that the minors jointly own the property; my understanding is—I have not read it
136 myself—that it covers the corner property. It is a part of the property of the petition to sell real estate, which was dated August, 1888. I offer in evidence the order of Judge Hartson made upon that petition and proof of service.

Defendants object to the offer as irrelevant, incompetent and immaterial; that it does not prove or tend to prove title in the plaintiffs in this case to the property in question. Objection overruled. Defendants except.

The paper referred to is received in evidence and marked Pl'ffs' Ex. "10." See ex. at page 363.

Mr. MURRAY: I next offer in evidence a decree of the probate court made September 3, 1888, signed by Millard T. Hartson, probate judge. I will read it after it has been marked.

Mr. HAPPY: We object to this offer on the same grounds that we have objected to the other.

Objection overruled. Defendants except.

The paper received in evidence and marked Pl'ffs' Ex. "11." See ex. at page 367.

Mr. MURRAY: I next offer in evidence a bond of the said P. D. Tull, with sureties, given pursuant to the order which I have just read, filed September 24, 1888, and recorded in Book 18 of Bonds, on page 228, executed by P. D. Tull as principal and C. F. Jackson and F. M. Tull as sureties, and approved by Judge Hartson on the 24th day of September, 1888.

Mr. HAPPY: We make the same objection that has been made to the other papers there, that it is irrelevant, immaterial and incompetent.

Objection overruled. Defendants except.

The paper is received in evidence and marked Pl'ffs' Ex. "12." See ex. at page 369.

Mr. MURRAY: I next offer in evidence notice of sale pursuant to that in which notice is given that a sale will be made of the property described in that decree, the same property, on the 20th
137 day of October, 1888, and with proof of posting and publication.

Defendants makes the same objection. Objection overruled. Defendants except.

The papers are received in evidence and marked Pl'ffs' Ex. "13." See ex. at page 371.

Mr. MURRAY: I next offer in evidence the guardian's report of the sale dated and filed November 26, 1888.

Objected to by defendants as irrelevant, incompetent and immaterial. Objection overruled. Defendants except.

The paper referred to is received in evidence and marked Pl'ffs' Ex. "14." See ex. at page 374.

Mr. MURRAY: This report of sale shows that the property described in the decree was offered. It says: "I offered said described real estate for sale at public auction to the highest bidder upon the terms mentioned in the said notice of sale, to wit, cash, and F. M. Tull having bid the sum of $14,000 for the same, and said real estate was then and there struck off and sold to him, the said F. M. Tull, for the sum of $14,000 cash, he being the highest and that being the highest bid therefor."

I next offer an order confirming the sale and directing conveyance that was made the 27th day of November, 1888, and entered the same day. I am not sure whether it is the 27th or 29th; it don't make any difference.

Objected to by defendants as irrelevant, immaterial and incompetent. Objection overruled. Defendants except.

The paper was received in evidence and marked Pl'ffs' Ex. "15." See ex. at page 377.

Mr. MURRAY: I next offer in evidence the guardian's deed executed and delivered pursuant to the proceedings which we have been proving here, dated the 28th day of November, 1888, from

P. D. Tull, guardian of these infants, to F. M. Tull, which recites the proceedings, signed by P. D. Tull as guardian, in the
138 presence of H. E. Houghton and James R. Dabney, acknowledged before Horace E. Houghton, recorded November 30th, 1888, at the request of F. M. Tull, in Book "V" of Deeds, page 320.

Defendants make the same objection. Same ruling. Defendants except.

The paper is marked Plaintiffs' Exhibit "16" and received in evidence. See ex. at page 380.

Court is thereupon adjourned to 10 o'clock tomorrow morning.

139 SEPTEMBER 16, 1898—10 o'clock a. m.

Court convened pursuant to adjournment and the trial of the case proceeded as follows:

F. M. TULL.

Direct examination resumed.

By Mr. MURRAY:

Q. Mr. Tull, when, or about when did you first make application to the German Savings and Loan Society for a loan of money, and to what agent or officer of the company did you first apply?

Mr. HAPPY: Let me ask a preliminary question.

(By Mr. HAPPY:)

Q. Was that application made in writing or orally?
A. Well, both, I think.
Q. Both. The last one was in writing?
A. Yes, sir.
Q. You mean that you spoke to somebody about getting a loan?
A. Yes, sir.
Q. Then afterwards made an application to the German Savings and Loan Society?
A. Yes, sir, on a printed form.

Mr. MURRAY: I will change my question.

(By Mr. MURRAY resumed:),

Q. Instead of what agent or officer, to what person did you first apply?

Mr HAPPY: We will make the objection to the question now on the ground that the application being in writing, that would be the best evidence.

The objection is overruled. Defendants except.

A. The first person that I talked with about the loan was Mr. Horace Cutter.
Q. Who was he?
A. Cashier of the First national bank.

Q. Of this city?
A. Yes, sir.
Q. About when did you have any talk with him?
A. Along in the early spring of 1888.
Q. Do you remember at one time of meeting in reference to a loan and talking with Mr. Goldsmith here in the city of Spokane?
140 A. I do.
Q. About when was that?
A. I think that was in May, 1888.
Q. Now, did you finally make a written application for a loan?
A. I signed a blank I think that Mr. Goldsmith furnished me. I think the formal application was made to him, the first application.
Q. Who furnished you the blank?
A. I could not say whether I got it direct from Mr. Goldsmith or Mr. Cutter.
Q. You filled it out and signed it?
A. I signed it.
Q. To whom did you deliver it after you signed it?
A. I could not say whether that was Mr. Cutter or Mr. Goldsmith, but I think I signed the application at the time Mr. Goldsmith was up to Spokane, looking over the loan, and to whom I gave it I could not say which one, Mr. Cutter or Mr. Goldsmith, I don't remember.

Mr. MURRAY: We have here, your honor, the answers of the defendant, The German Savings and Loan Society, two interrogatories, and I will now introduce them and read them in evidence. I think we will read all of the interrogatories just now. A part of them apply to this particular transaction, and they cover more or less all the transactions clear through. We might as well read them all through and be done with it.

Mr. Murray here reads the interrogatories referred to, to the court.

Mr. HAPPY: I suggest this rather an irregular way of examining Mr. Tull as a witness and a lot of this other matter interjected here.

Mr. MURRAY: In reading all of this it is perhaps not pertinent at the present time, but it will be pertinent before we get through, and some of it is distinctly in favor of the defendants themselves, but it is better to have the thing in altogether. We expect before we get through to meet everything against us.

Q. Now, Mr. Tull, had that application of yours for the loan of $40,000 been consummated at the time of the death of your
141 wife in 1888, or had it not?
A. No, it had not.
Q. When, if at all, as near as you can state, did that application result in the loan being consummated?

Objected to by defendants on the ground that the record is the best evidence.

Mr. HAPPY: The mortgage will show when it was consummated; you have already introduced the mortgage, I think?

Mr. MURRAY: It has not been introduced but I am going to introduce it immediately. It seems to me that an objection of that kind is rather captious.

The COURT: Let him answer it.

Q. About when?
A. I think it was about December that the mortgage was finally made, as near as I can recollect, along late in the fall or winter; I don't remember the date.
Q. (Handing witness paper.) State whether or not this mortgage was executed by you to the loan company in pursuance of an application which has been read?
A. Yes, sir, that is my signature to it.

Q. Mr. MURRAY: I offer this in evidence now.
The paper is received without objection and marked Pl'ffs' Ex. "17." See ex. at page 383.

Q. Who drew that mortgage, if you know?
A. I don't know; I don't know who drew the mortgage; I know it was handed to me to sign.
Q. Who presented it to you to sign?
A. Either Mr. Kinnaird or Mr. Happy, I don't know which—I don't mean Mr. Happy—Mr. Cutter.
Q. Mr. Kinnaird or Mr. Cutter?
A. Yes, sir.
Q. Did you or did you not employ any one to draw this mortgage, and if so, whom?
A. I didn't employ any one.
Q. Was this mortgage executed and delivered by you at the time or about the time it bears date?
A. I think the exact time.
Q. After executing the mortgage to whom did you deliver it?
142 A. I don't remember whether it was Mr. Kainnaird or Mr. Cutter. They were the two men I was dealing with here.

Mr. MURRAY: I call the attention of the court now to the fact that this is drawn upon one of the blanks evidently used by this corporation, witnessed by Frank C. Nash and J. M. Kinnaird and acknowledged before Kinnaird.

Q. Who paid you the $40,000 in money which you procured on the strength of that mortgage?
A. The First national bank. I am not positive now whether the money—I think the drafts came to the bank and I signed them. It is my recollection that the drafts came to the bank from the company, and I signed them; I think that is the way of it. Anyway, I got it through the bank, but I don't know exactly which way; I don't remember.
Q. The money was paid to you through the First national bank of this place?
A. Yes, sir; paid out in installments as I needed it on the building.
Q. Now, Mr. Tull, during the pendency of this application for a loan, and after the death of your wife, what took place between you

and other persons in reference to this loan, occasioned by the death of your wife?

Mr. HAPPY: We object to that as irrelevant, immaterial and hearsay, and it is too general; what took place between him and other persons would not be evidence so far as the defendant in this case is concerned.

Q. Instead of making that quite so general, instead of "other persons," what took place between you and Mr. Cutter, or Mr. Kinnaird?

Mr. HAPPY: We object to that for the same reason, on the ground that it is immaterial, irrelevant, incompetent and hearsay; it has nothing to connect the German Savings and Loan Society with Mr. Cutter or Mr. Kinnaird.

Objection overruled. Defendants except.

143 A. Do you mean in regard to this loan?

Q. Yes.

A. Well, I was notified by, I don't know which one of them, I could not say now. Mr. Cutter kind of had charge of the business so far as I know at this end of the line, and I was notified after her death that I could not get the loan, that they refused the loan.

Q. For what reason?

Defendants make the same objection. Same ruling. Defendants except.

A. Well, I think for the reason that I could not give a title.

Q. How soon after her death did you receive that notice?

A. I don't know; I could not say as to that; it was not long, though, because I was needing the money and I was pressing the matter myself.

Q. Now, was that information or notice communicated to you in writing or orally?

A. Orally, I think.

Q. What then was donw in reference to——

(By Mr. HAPPY, interrupting:)

Q. You refer to a bank there. Do you mean the First national bank?

A. I mean Mr. Cutter; I was dealing with Mr. Cutter.

(By Mr. MURRAY, resumed:)

Q. What steps were then taken upon the receipt of that notice to perfect the title and at whose suggestion?

Mr. HAPPY: We object to that on the ground that the record is the best evidence of what was done; and further it is irrelevant and immaterial; anything that is not covered by the record would be hearsay.

The COURT: I will allow this question.

Defendants except.

A. Well, I was notified by some one, I could not say who it was,

at any rate that I would have to go through probate proceedings before they would make the loan. I don't remember who that was.

Of course, that was what I was notified; it has been so long
144 I disremember; I presume it was Mr. Cutter. I done most of the dealing with Mr. Cutter at that time; didn't know any one else. I was dealing with Mr. Cutter at this end; Mr. Goldsmith had been here and had went away, but I had made my first application to Mr. Cutter and it seemed like I had to refer to Mr. Cutter after that, after Mr. Goldsmith was here, for everything. He told me what to do; he directed this end of the corresponding, negotiations for this money.

Q. You may state now whether or not, if you know, that the guardianship proceedings, which were introduced in evidence yesterday afternoon, were had in pursuance of that suggestion?

A. Well, they followed after——

Objected to by defendants as immaterial, incompetent and irrelevant. Objection overruled. Defendants except.

A. (continued). The probate proceedings followed that, and I afterwards employed lawyers to probate it, the estate.

Q. That does not quite answer the question. I wish you would state if you know whether or not the guardianship proceedings are the proceedings which you mean by probate proceedings.

A. Yes sir.

Q. At whose suggestion was that proceeding had?

Objected to by defendants on the ground it is immaterial, irrelevant and hearsay. Objection overruled. Defendants except.

A. I could not exactly state who, but I was informed by either Mr. Cutter—I think it was Mr. Cutter, at that time, whoever I was dealing with—I would have to go through a probate proceeding before I could get the money; I don't know exactly who it was, but I think it was Mr. Cutter, as near as I remember.

Q. What, if anything, was said to you in that connection by Mr. Cutter or Mr. Goldsmith as to who in town here must be satisfied as to the title on behalf of the company?

Defendants object as irrelevant, immaterial and hearsay.
145 Objection overruled. Defendants except.

A. I don't know as I can answer that. State that again.

Q. (Question read.)

A. I don't know as I can answer that just as it is given.

Q. Well, you may answer it as you can, then.

Mr. HAPPY: If the witness cannot answer the question he cannot answer it.

Mr. MURRAY: Perhaps he can't quite understand me.

Q. Were you informed or directed by any person acting or assuming to act on behalf of this corporation as to who must be satisfied with this title, to whom it must be referred on their behalf.

Objected to by defendants for the same reason. Objection overruled. Defendants except.

A. Well, I was informed that they would not make the loan on the title that I could give at that time, and when I went into the probate proceedings I tried at all times to carry out their instructions of their agents here so as to make the title as they wanted it, because I wanted the money very bad; I had to have it. My building was partly under construction and I was in great danger of losing it all if I could not get more money to complete it, and I was very anxious to make the loan.

Q. Now, whose instructions did you act under in perfecting that title?

Mr. HAPPY: I wish to move your honor to strike out that portion of the answer of the witness to the preceding question in which he assumes to have acted under the direction of agents of the German Savings and Loan Society. Whether they were agents or not is a matter to be proven and not to be assumed by the witness. I move to strike out that portion of the answee as not responsive to the question.

The motion is denied. Defendants except.

Defendants make the same objection to the last question as
146 to the preceding. Objection overruled. Defendants except.

A. Mr. Kinnaird, he seemed to be the acting attorney here.

Defendants move to strike out the statement that "he seemed to be the acting attorney here" as hearsay and a mere conclusion of the witness.

Motion granted. Plaintiffs except.

Q. Who was your attorney conducting that proceeding, or who was the attorney in conducting that proceeding on behalf of the applicants?

A. Houghton, Graves & Jones.

Q. Mr. Tull, you may now state what reason, if any there was, for the application for guardian of your children being made by your brother, and for the appointment of him as guardian instead of yourself.

Objected to by defendants as calling for a conclusion of the witness—a legal conclusion—and as irrelevant, immaterial and incompetent.

The COURT: I don't see what the materiality of the question of motive has to do here. If plaintiffs were actually defrauded by reason of defendants' acts they were defrauded, and that is all there is to it. I don't think it is competent.

Objection sustained. Plaintiffs except.

Q. You became the purchaser of this property at a guardian's sale.

Objected to by defendants as not the best evidence. Objection sustained. Plaintiffs except.

Q. You are the same F. M. Tull who purchased at the guardian's sale and who received the guardian's deed, are you not?

A. Yes, sir.

Q. At the time of the sale, November 28th, I think it was, 1888, what was the value of that property, 100 feet on Riverside avenue and 100 feet on Stevens street, the corner property?

Objected to by defendants as irrelevant and immaterial, and calling for the opinion of a witness not shown to be an expert.

The COURT: The owner of the property may testify as to
147 its value.

Objection overruled. Defendants except.

A. I think about $50,000 at that time, for that corner.

Q. In that answer do you not include the building, or simply the lot?

A. There was no building on it at that time.

Q. Did you pay or did you not pay P. D. Tull, the guardian, any money at the time of that sale?

Objected to by defendants as irrelevant, immaterial and incompetent.

The COURT: It would only become material if it is shown here that the German Savings and Loan Society knew at the time that it had not been paid.

Objection overruled. Defendants except.

A. There was no cash paid.

Q. Was there ever at any time any cash paid by you to the guardian as the purchase price or consideration of that sale?

Objected to by defendants as leading and for the same reasons as stated before. Same ruling. Defendants except.

A. There was not.

Q. Now, what, if anything, did Mr. Cutter say to you at any time pending this proceeding, in reference to the proceeding, and to whom did he direct you in reference to it?

Objected to by defendants as irrelevant, immaterial and hearsay. Objection overruled. Defendants except.

A. He direct- me to Mr. Kinnaird for any legal questions in the proceedings.

Q. What, if anything, did you do then in reference to consulting Mr. Kinnaird about it?

Objected to by defendants for the same reason. Objection overruled. Defendants except.

A. I consulted Mr. Kinnaird a good deal all through that proceeding until I got the loan, handed the abstracts, papers and such
148 things to him. He seemed to be, so far as I know, acting as agent of the company. I did not know any one else at the time.

Mr. HUGHES: We move that the last statement expressing the opin-

ion of the witness as to what Mr. Kinnaird seemed to him, be stricken out as incompetent, as hearsay and a mere conclusion of the witness.

Objection sustained. Plaintiffs except.

Mr. NASH: Upon that proposition we contend in the pleadings here that J. M. Kinnaird was the agent of the German Savings and Loan Society in this transaction, and we intend to prove, and expect to prove, that the German Savings & Loan Society had actual notice of these proceedings.

The COURT: I will admit all of the testimony tending to show that he was agent, but the statement of the witness will not be competent on that subject.

Q. As a matter of fact, state whether or not Mr. Kinnaird was informed from time to time by you or by others in your presence, of the progress of that proceeding.

Objected to by defendants as irrelevant, immaterial, incompetent and hearsay. Objection overruled. Defendants except.

Q. I talked with Mr. Kinnaird several times, very often, about this probate proceeding.

Q. (Handing witness paper.) Was that paper executed by you and delivered at or about the time it bears date?

A. Yes, sir, that is my signature.

Mr. MURRAY: I now offer in evidence a mortgage dated the first day of March, 1889, signed by F. M. Tull, witnessed by H. E. Houghton and W. C. Jones, acknowledged before Houghton, recorded on the 8th day of March, 1889.

Objected to by defendants as irrelevant, incompetent and
149 immaterial, and for the further reason that it is the mortgage that is described in the first cause of action, which defendant insists is merged in the second cause of action set out in plaintiffs' complaint. Objection overruled. Defendants except.

The paper is received in evidence and marked Pl'ffs' Ex. "18." See exhibit at page 388.

Q. This mortgage secured the payment of $14,000. For what consideration was that mortgage given?

Objected to by defendants as irrelevant, immaterial and incompetent. Objection overruled. Defendants except.

A. $14,000.

Q. That appears from the face of it, Mr. Tull, but how did the consideration of it arise?

Objected to by defendants as irrelevant, incompetent and immaterial, and the paper ought to speak for itself; that the mortgage is the best evidence. Objection overruled. Defendants except.

A. That was given for the purchase price, as security for the purchase price of this half, of the children's part bought in.

Q. For the purchase price of that $14,000 purchase price which you made a few months before?

A. Of the first sale.

Defendants make the same objection. (No ruling.)

Mr. MURRAY: I call the attention of the court to the fact that this mortgage was not executed or recorded until March after the sale. In the meantime the defendants' mortgage was executed on the 30th of November, only two days after the sale, and put on record, and took precedence over these children's mortgage. This is a mortgage to P. D. Tull as guardian, making it a second mortgage.

150 I now offer in evidence the report of the guardian P. D. Tull, reporting the manner in which he had invested the proceeds of that sale of that real estate which had taken place in November. This is filed March 7, 1889.

This paper is received without objection and marked Pl'ffs' Ex. "19." See ex. at page 392.

Mr. MURRAY: We next offer in evidence an order of the court approving that investment, made March 7, 1889, and entered the same date.

The paper is received in evidence without objection and marked Pl'ffs' Ex. "20." See ex. at page 394.

Q. Now Mr. Tull, when was the fire that destroyed all of the buildings on your property?

A. August 4, 1889, I believe.

Q. How much insurance was carried on your building at that time?

A. $50,000; $55,000 total.

Q. To whom was the insurance money paid by the company?

A. $40,000 paid to the German Savings and $10,000 to the Sun Insurance Company and $5,000 was paid to me individually.

Q. And by reason of that payment, I suppose that went to pay the $40,000 mortgage, did it not?

A. Yes.

Mr. MURRAY: We offer in evidence a release of the mortgage; this is a copy, not certified yet.

Mr. HUGHES: It will not be necessary; if we are certain it is a true copy we will not ask it to be certified.

The paper is received in evidence, and marked Pl'ffs' Ex. "21." See ex. at page 395.

Q. Mr. Tull, after the fire and in August, 1889, what steps did you take towards procuring another loan from the German Saving- and Loan Society?

A. Why, about the usual way. I think the way I did in the first place, through Mr. Cutter and Mr. Goldsmith we made a new loan.

Q. Did you make a written application?

A. I think I filled out a blank form; that is my recollection now, the same as we usually do.

Mr. MURRAY: I will leave that and go to something else

151 until afternoon. I now offer petition made by P. D. Tull, as guardian for the three minors, to the probate court of Spokane county, filed August 12, 1889, in said court, petitioning for the sale

of real estate belonging to said minors and describing the real estate sought to be sold as being the remaining portion of the real estate in controversy here, remaining beyond that which was sold in the proceedings which we introduced yesterday.

The paper is received in evidence without objection and marked Pl'ffs' Ex. "22." See ex. at page 398.

Mr. MURRAY: We next offer in evidence the original order to show cause, issued by the probate court in that proceeding.

The paper is received in evidence without objection and marked Pl'ffs' Ex. "23." See at page 402 for exhibit.

Mr. MURRAY: I offer in evidence proof of the issuing of notice and proof of service and publication, and order fixing time for hearing the order to show cause.

The papers referred to are received in evidence without objection and marked Pl'ffs' Exs. "24," "25," and "26," respectively. See ex. at pages 405–406.

Mr. MURRAY: Next is an order appointing A. J. Shaw guardian *ad litem* for the infants in that proceeding.

The paper is received in evidence without objection and marked Pl'ffs' Ex. "27." See exhibit at page 408.

Mr. MURRAY: I next offer in evidence a decree of the court ordering the guardian to sell the premises, made on the 14th day of September, 1889, and directing the execution of a bond in the sum of $40,000.

The paper is received in evidence without objection and marked Pl'ffs' Ex. "28." See ex. at page 409.

Mr. MURRAY: I next offer the bond given by P. D. Tull as principal, and F. M. Tull and D. B. Fotheringham as sureties, in pursuance of that decree.

The paper is received in evidence without objection and
152 marked Pl'ffs' Ex. "29." See ex. at page 412.

Mr. MURRAY: I next offer in evidence the guardian's report of sale made pursuant to that order filed November 30th, 1889.

The paper is received without objection and marked Pl'ffs' Ex. "30." See it at page 414.

Mr. MURRAY: We offer in evidence an order directing the posting of notice of sale and proof of posting.

The paper referred to is received without objection and marked Pl'ffs' Ex. "31." See it at page 420.

Mr. MURRAY: I offer in evidence a decree of the court dated 10th day of December, 1889, confirming the report of the guardian and directing him to convey to F. M. Tull the premises described in this proceeding.

The paper referred to is received in evidence and marked Pl'ffs' Ex. "32." See it at page 421.

Mr. MURRAY: I now offer in evidence a certified copy of the guardian's deed made by P. D. Tull as guardian on the 10th day of December, 1889, conveying to F. M. Tull the premises described in the order of sale of 1889, in consideration of $20,000, reciting that F. M. Tull had become the purchaser at this sale, executed by P. D. Tull in the presence of Joseph Rosselot and F. H. Graves,

acknowledged before Chester Glass, recorded on the 11th day of December, 1889, at 11 o'clock a. m. and this is a certified copy.

The same is received without objection, marked Pl'ffs' Ex. "33.', See it at page 424.

153 Q. Mr. Tull, who was present at the guardian's sale of the lands on the 26th day of October, 1889?

Objected to by defendants as irrelevant, incompetent and immaterial. Objection overruled. Defendants except.

A. Myself, and my brother and Judge Houghton.

Q. Who were the bidders at that sale?

Defendants object for the same reason. Objection overruled. Defendants except.

A. I was the only bidder.

Q. You were the only bidder. What was the amount of your bid.

Defendants object for the same reason. Objection overruled. Defendants except.

A. Which sale is that?

Q. The second sale.

A. $20,000.

Q. What if any amount of money upon the price bid by you did you pay at that time to the guardian, or to any one else for him?

Defendants object as irrelevant, incompetent and immaterial. Objection overruled. Defendants except.

A. I did not pay anything.

Q. When did you, if at all, pay to the guardian the $20,000 bid by you?

Defendants object as incompetent, irrelevant and immaterial. Objection overruled. Defendants except.

A. I paid him by note. I don't know just what time. Later on; I paid him by note.

Q. Your answer is good enough in part. When, if at all, did you pay to him in money the $20,000 or any part of it?

154 Defendants object as irrelevant, incompetent and immaterial. Objection overruled. Defendants except.

A. I did not pay any money at no time.

Q. In what way did you pay or secure to him that $20,000?

Objected to by defendants as irrelevant, incompetent and immaterial. Objection overruled. Defendants except.

A. I gave my note and a second mortgage, I think, on the property.

Q. I will ask you a question relating to the former sale which I omitted. In the guardian's sale, Mr. Tull, of November, 1888, that is, the first sale, who was present at that sale?

Defendants object as irrelevant, incompetent and immaterial. Objection overruled. Defendants except.

A. Just the same parties that were in the first.
Q. Name them.
A. My brother, Mr. Houghton and myself.
Q. Who were the bidders at that sale?

Defendants object for the same reason. Objection overruled. Defendants except.

A. I was the only bidder.
Q. What was the amount of your bid?

Defendants object as irrelevant, incompetent and immaterial. Objection overruled. Defendants except.

A. That was $14,000.

Mr. MURRAY: I now, if the court please, go back to a paoint where we dropped in order to allow defendant- to produce the papers.

Q. I think you have already testified, Mr. Tull, but to be sure I will ask you again. After the fire state whether or not you made a written application to the mortgage company for a loan upon
155 the security of this property.
A. Yes, I did.
Q. (Handing witness paper.) Look at that paper and the signatures to it and see if that is your signature and the application which you signed?
A. Yes, sir, that is my signature.
Q. Is that the paper which you signed at that time?
A. Yes, sir.
Q. To whom did you present or deliver this paper?
A. Mr. Cutter, I think.
Q. Whom did you say?
A. Mr. Cutter, Horace Cutter.
Q. Cashier of the First national bank?
A. Yes, sir.
Q. Do you know by whom this application was filled up, the written part of it?
A. I don't; I don't recollect.

Mr. MURRAY: I offer an application, part in printing and part in writing, dated Spokane, August 21, 1889, signed by F. M. Tull. It is dated at the bottom on the 20th of August, 1889. Attached to it is a report dated the same day, signed by B. Goldsmith, in which the application is for a $40,000 loan, in which the property is represented to be worth $75,000; Mr. Goldsmith's recommendation, and also the telegram attached to it in which Mr. Goldsmith telegraphed to the company that instead of $40,000 they wanted $50,000; together with a memorandum accepted August 31, 1889 for $50,000, endorced in writing by the defendant company.

The same is received without objection, and marked Pl'ffs' Ex. "34." See ex. at page 428.

Q. (Handing witness paper.) Was that paper executed by you?
A. Yes, sir, I signed it.
156 Q. Tell if you know who drew up that paper?
A. I don't know who drew it.

(By Mr. HAPPY:)

Q. Did you see it written, Mr. Tull?
A. I don't know whether I did or not; I could not tell.

Mr. HAPPY: I object to the question on the ground that the witness is not shown to be an expert at handwriting.
No ruling.
The WITNESS: I could not say who wrote it.

(By Mr. MURRAY, resumed:)

Q. Where and in whose possession did you first see it?
A. Mr. Kinnaird's, I think; that is my recollection.

(By Mr. HAPPY:)

Q. What is that?
A. Mr. Kinnaird. It is my recollection he presented it to me to sign.

(By Mr. MURRAY, resumed:)

Q. Did you employ any one to prepare this mortgage for you?
A. I did not.
Q. State whether or not Mr. Kainnaird was at that time acting for you as your agent or advisor in reference to this mortgage and the execution of this paper?

Defendants object as calling for a conclusion. Objection overruled. Defendants except.

A. He was not.

Mr. MURRAY: I now offer in evidence this mortgage, dated the 26th day of October, 1889, signed F. M. Tull, in the presence of J. M. Kinnaird and C. H. Wolf, acknowledged before J. M. Kinnaird, for $50,000 upon the corner property 99.42 feet by 100 feet on Riverside avenue, the same property we had before, and also the certificate of record endorsed upon it, recorded the 28th day of October,
157 1889, M. D. Smith, auditor, at the request of J. M. Kinnaird.
The paper is received without objection and marked Pl'ffs' Ex. "35."

Mr. MURRAY: I now offer in evidence, it is a little late, but that was occasioned by our having to send down and get it certified, a delease executed by Perry D. Tull as guardian of these three chiltren, releasing the $14,000 mortgage, which w as introduced this morning. It was executed on the 7th day of December, 1889, in the presence of H. E. Houghton and W. C. Jones, filed for record on he 11th day of September, 1889, and recorded September 18, 1889.
The paper is received without objection and marked Pl'ffs' Ex. "36." See it at page 431.

Q. Now, Mr. Tull, do you remember the occasion when Perry D. Tull, the guardian, released the $14,000 which you had given?

A. The exact time, you mean? I don't understand what you mean.

Q. Do you remember the fact of his making a release of that mortgage?

A. Yes, I remember that.

Q. About what time was it, as near as you remember?

Mr. HAPPY: The release, I think, would be the best evidence, unless he had lost it.

A. I could not say the date as to that.

Q. What part, if any, of the amount of money due on that mortgage, that $14,000, did you pay at the time of the release, or had you at any time paid?

Defendants object as irrelevant, incompetent and immaterial, and leading. Objection overruled. Defendants except.

A. I did not pay any part of it.

158 Q. What part of the money secured by that mortgage, if any, did you ever pay to Perry D. Tull as guardian?

Defendants object for the same reason. Same ruling. Defendants *object.*

A. I never paid him a cent.

Q. What, if any, consideration was there for the release of that $14,000?

Defendants object for the same reason. Same ruling. Defendants except.

A. I don't know as there was any.

Q. At whose request was that release made by him?

Defendants object as irrelevant, incompetent and immaterial. Objection overruled. Defendants except.

A. Mr. Kinnaird's.

Q. Mr. Kinnaird's?

A. I had to release that before they would place the other loan on it when I made the reloan from the company.

(By Mr. HAPPY:)

Q. That is, by the German Savings and Loan Society?

A. Yes, sir.

(By Mr. HAPPY:)

Q. Refused to take a second mortgage on your property?

A. Yes, sir.

(By Mr. MURRAY, resumed:)

Q. You may tell if you know why Mr. Kinnaird came to request a release of that mortgage.

Defendants object as calling for the conclusion of the witness.

A. I could not tell that.

Objection sustained. Defendants except.

Q. In securing that release and in the transaction being had about that time, state whether or not Mr. Kinnaird was employed by you and was under employment as your attorney, agent or otherwise.

159

Defendants object as irrelevant, incompetent and immaterial. Objection overruled. Defendants except.

A. He was not employed by me for any purpose at that time.

Q. Now, Mr. Tull, when did you next make an application to the German Savings and Loan Society for another loan after the $50,000 loan was made?

A. I think—I got two or three loans after that; I think the next was in——

Q. (Interrupting.) I will help you a little, Mr. Tull. Did you soon afterwards apply to the company for another loan of $25,000?

A. Yes, sir, the same year.

Q. (Handing witness paper.) Look at that and see if that is the paper you signed. Is that paper signed by you?

A. Yes, sir.

Q. In whose handwriting are the blanks filled, if you know?

A. I guess I filled them out myself. It looks like my handwriting. There could not anybody else do it.

Q. To whom did you *rep*sent that application? Look at that letter attached to it, Mr. Tull, is that your handwriting?

A. I wrote the first one, yes. Do you mean the one over here?

Q. No, the letter in front?

A. I wrote that.

Mr. MURRAY: I now offer that application with the letter attached to it in evidence. It is dated November 25, 1889, signed by F. M. Tull, purports to be an application for a loan of $25,000 upon a part of the property, if not all of it, that is in dispute there and has attached to it of date November 25th, a recommendation and estimate of value by Goldsmith; annexed to it is a letter written by F. M. Tull, and dated November 22nd, directed to B. Goldsmith, merely forwarding the application. It will show for itself.

160

Objected to by defendants as irrelevant, incompetent and immaterial; and for the further reason that it shows that it is an application for a loan on the property other than that covered by the $14,000 mortgage and the $34,000 mortgage described in plaintiffs' complaint. Objection overruled. Defendants except.

The paper is received in evidence and marked Pl'ffs' Ex. "37." See ex. at page 436.

Q. (Handing witness paper.) Look at the signature of that and see if it is a paper executed by you?

A. Yes, sir, it is my signature.

Q. In whose handwriting if you know is the written part of the body of the instrument. Look at the front page?

A. I don't know.

Q. Who prepared this paper for execution?

A. I could not say who prepared it.

Q. You don't know who presented it to you?

Objected to by defendants as irrelevant, incompetent and immaterial. Objection overruled. Defendants except.

A. Either Mr. Cutter or Mr. Kinnaird, either one, I don't know which one.

Q. Did you employ anybody to prepare this instrument, if so whom?

A. I did not empliy any one.

Q. Where did you first see it?

161 A. In Spokane; I don't know what place *what place.*

Q. In whose possession did you first see it?

A. I don't know as I could say whether it was Mr. Cutter or Mr. Kinnaird; Mr. Kinnaird generally called me in and I signed all those instruments before him. Mr. Cutter might have presented it to me first, I don't know, but I always signed before Mr. Kinnaird.

Mr. MURRAY: I now offer in evidence a mortgage, dated the 30th day of December, 1889, executed by F. M. Tull, in the presence of J. M. Kinnaird and F. K. McBroom, acknowledged before McBroom as notary public, being a mortgage of $25,000, upon the premises involved in this suit, or a part of them. I have not read the description to see how much it does cover.

Mr. HAPPY: We object for the same reason, that it relates to property other than described in the $14,000 and the $34,000 mortgages. It does not describe any of the property included in either of those mortgages.

Mr. MURRAY: It covers a part of the premises that are in dispute in this action.

Mr. HAPPY: There is no suggestion that this is not a foreclosure proceeding.

Objection overruled. Defendants except.

The paper is received and marked Pl'ffs' Ex. "38." See it at page 442.

Mr. MURRAY: I now offer in evidence a mortgage dated the 31st day of December, 1889, executed by F. M. Tull to P. D. Tull as guardian to secure the sum of $34,000, signed by F. M. Tull, in the presence of F. H. Gromez and W. C. Jones, acknowledged

162 before Jones, recorded January 30th. Upon the margin of this mortgage in the record is a release the 7th day of April, 1892, signed by P. D. Tull. The auditor certifies, that "the above and foregoing instrument is a full, true and correct copy of mortgage and marginal release." The auditor has made a mistake. "Release F. M. Tull to P. D. Tull." I will send that back and make him correct it. I offer this certified copy in evidence and in doing so I call attention to the fact that this $34,000 mortgage given

to P. D. Tull as guardian, was executed on the 31st day of December, 1889, the next day after the $25,000 mortgage was made to the defendant corporation here, and some time after the $50,000 mortgage was made.

The paper is received in evidence without objection and marked Pl'ffs' Ex. "39." See ex. at page 447.

Q. What was the consideration for which you gave to P. D. Tull that $34,000?

Defendants object as irrelevant, incompetent and immaterial. Objection overruled. Defendants except.

A. There was not any consideration.

Q. What moneys was it intended to secure, if any?

Defendants make the same objection. Objection overruled. Defendants except.

A. The $34,000, that was the price of the two mortgages combined, the two sales of this real estate combined, to the children.

Q. It is the $20,000 purchase price?

A. And the fourteen.

Q. And the $14,000 which had been in the former mortgage, but released?

A. Yes, sir.

163 Q. Did you receive from P. D. Tull at the time of this $34,000 mortgage, any money in consideration of the purchase?

Defendants object as incompetent, irrelevant and immaterial. Objection overruled. Defendants except.

A. I did not.

Q. Did you ever receive from him any money in consideration of that mortgage?

Defendants make the same objection. Objection overruled. Defendants except.

A. I did not.

Q. Was there any consideration for it, except the purchase by you of that property?

Defendants make the same objection, and the further objection that that calls for the conclusion and opinion of the witness as well as for a legal conclusion. Objection overruled. Defendants except.

A. There was none.

Q. You may state, Mr. Tull, whethere or not you ever, at any time made a further application to this company for a further loan and to include these two mortgages.

Mr. MURRAY: I suppose there is no dispute about the fact that these two mortgages were merged in the subsequent one.

Mr. HAPPY: I think the pleadings concede that.

Q. (Handing witness paper.) Look at that and see if that is your signature?

A. Yes, that is my signature.

Q. Is this paper, Mr. Tull, signed by you?

A. Yes, sir, I signed that.

Mr. MURRAY: I will offer this in evidence; it is an application for a $20,000 loan, dated the 10th day of March, 1893, to which is attached the recommendation by Mr. Goldsmith to the company.

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The paper is received without objection and marked Pl'ffs' Ex. "40." See ex. at page 452.

Q. Prior to that time had you made an application for a $100,000 including the $25,000?

A. I think the first was fifty and the next was twenty-five—seventy-five more, then the next one was one hundred; I don't know when that came in, and then the last twenty was on another piece of property on the Sprague Street front, but it also covered a second mortgage on this Riverside property.

Mr. HUGHES: You made a slip of the tongue there which you evidently did not intend; you said the first was fifty, and the next was seventy-five more.

The WITNESS: Seventy-five I mean additional; the next was twenty-five.

Mr. HUGHES: You mean the next was twenty-five, twenty-five more.

The WITNESS: It seems it was fifty and twenty-five more, then a hundred, and then one hundred and twenty. The last was on the Sprague Street property, but it reached over and covered the whole property.

Q. Now, Mr. Tull, in 1892, some time, did you execute another mortgage for $100,000 to the defendant, this company?

A. I executed one mortgage of a hundred thousand dollars, yes.

Q. And that, if I understand you correctly, covered the $50,000 mortgage and the $25,000 mortgage?

A. Yes, sir.

Q. And the $20,000 additional loan to you?

A. Yes, covered the first two mortgages.

(By Mr. HUGHES:)

Q. You mean it took up the first two?

A. Took up the seventy-five at that time and increased it to one hundred.

(By Mr. MURRAY, resumed:)

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Q. Now, Mr. Tull, at the time you gave the $100,000 mortgage, did the mortgage company release to you the $50,000 mortgage?

A. Yes, sir.

Q. And at the same time the $25,000 mortgage?

A. Yes, they released the fifty, I think; no, I think fifty was separate and the twenty-five was separate. Those were two separate mortgages, and then when I got the hundred they were both released and they were both put in one. Now, that is my recollection; I might be mistaken as to that.

Q. Were those the releases delivered to you at the time?

A. I think they are.

Mr. HUGHES: If it will save any time we will admit that they were and let them be introduced in evidence.

Mr. MURRAY: I offer them in evidence.

The same are received without objection and marked Pl'ffs' Exs. "41" and "42" respectively. See them at pages 455–457.

Mr. MURRAY: I offer in evidence now mortgage executed by Tull on the 5th day of May, 1892, to the defendant the mortgage company, signed in the presence of Kinnaird and Onderdonk, acknowledged before Onderdonk, recorded May 11, 1892.

Q. (Handing witness paper just referred to.) Look at that first paper and see if that is a mortgage executed by you?

A. Yes, sir.

Q. By whom was that prepared, if you know?

A. I don't know who it was prepared by. I think I referred it to Mr. Kinnaird; I had it there; signed it there; I don't know who prepared it; I could not say.

Q. Look at the second one.

A. I see my signature there twice, in two different places.

Q. There are two papers there, what do you say as to the second one? Who prepared that?

A. I should say it was Mr. Kinnaird. I signed that, I think, in the presence of Mr. Kinnaird.

166 Q. Was Mr. Kinnaird employed by you with reference to those mortgages as your attorney or agent?

Objected to by defendants as incompetent, irrelevant and immaterial. Objection overruled. Defendants except.

A. He was not.

Mr. MURRAY: I offer first the $100,000 mortgage, recorded May 11, 1892, at the request of Kinnaird and Happy, and the $20,000 mortgage recorded May 23, 1893, at the request of Kinna-rd and Happy.

The papers offered are received without objection and marked Pl'ffs' Exs. "43" and "44" respectively. See them at pages 459–462.

Cross-examination.

By Mr. HAPPY:

Q. Mr. Tull, I believe you testified in your direct examination that you lived in Kansas prior to——

Judge NASH: Before you proceed with that, Mr. Happy, there is some proof here, merely informal, in regard to the value, and de-

pending upon a witness who is very busily engaged. If you will allow this witness to be withdrawn for the present, we have one witness——

Mr. HUGHES: We do not object to withdrawing this witness for the present.

The witness Tull is here withdrawn for the purpose of putting in the testimony of the witness James N. Glover.

167 JAMES N. GLOVER, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. L. B. NASH:

Q. Mr. Glover, how long have you resided in this city?

A. Twenty-five years.

Q. State whether or not you are acquainted with the values of property in this city from the time of your residence here up to the present time?

A. Oh, I think so.

Q. Are you acquainted with the value of the property and the character of the property now occupied by the Tull block?

A. Yes, sir.

Q. State what connection or relation you had to that property originally?

A. I built my first residence of any note that I built here on that property.

Q. On that same property?

A. Yes, sir, in 1879.

Q. Do you remember how far that property extended from street to street, or what was the dimensions of it?

A. From street to street?

Q. Yes, sir.

A. You mean the distance from Riverside to Sprague?

Q. Yes.

Mr. HUGHES: I think the record would be the best evidence.

A. 179 and some fraction.

Q. Now, during the years 1889, 1890 and 1891, what was the value of the real estate, 150 feet on Riverside, 60 feet running back to Sprague street, 180 feet; what was the value of that property on Riverside per front foot?

Defendants object as irrelevant, incompetent and immaterial; and the witness has not been shown to be an expert. Objection overruled. Defendants except.

A. I don't know that——

Q. (Interrupting.) I am asking you now, Mr. Glover, the value of the property fronting on Riverside, 150 feet, running back 100 feet.

168 A. I understood it was 180.

Mr. HAPPY: That is a different question from the one that was asked before. I object to this for the same reason.

(No ruling.)

Q. A part of this property 60 feet, runs back 180 feet, and then the remaining property is 100 feet. What I want now, Mr. Glover, is to divide it up and say what was the value of the 150 feet fronting on Riverside, running back 100 feet, per front foot. I think you understand the question.

Objected to by defendants as irrelevant, incompetent and immaterial. Objection overruled. Defendants except.

A. I understand the question.

Mr. HAPPY: Have you fixed the date?

Mr. NASH: Yes, I said during the years 1889, 1890 and 1891.

A. I think it was reasonably worth $750 per front foot in those years.

Q. I will ask you in that connection, Mr. Glover, whether or not that was the market value of the property at that time in this city.

Defendants make the same objection as before. Same ruling. Defendants except.

A. I think it was, yes, sir.

Q. Now, Mr. Glover, as I have said before, there was 60 feet of that property running back 180 feet onto Sprague. Now, what was 60 feet of the same property worth running back 80 feet fronting on Sprague, and tapping the property on Riverside, per front foot?

Same objection. Same ruling. Defendants except.

A. 80 by 60 fronting on Sprague?

Q. 60 front on Sprague, running back 80 feet deep.

A. Oh, I think that was worth at that time about $500 a front foot.

Q. $500 a front foot?

A. Yes, sir.

Q. Now, Mr. Glover, being familiar with all of this property, and its dimensions, what would be a fair valuation for the entire property in those years, 1889, 1890 and 1891?

A. That is, including the improvements?

169 Q. No, just the real estate as before.

Objected to by defendants for the same reason, and as calling for a computation.

A. I have made no figures on it. I have given the price.

The COURT: I don't think it is necessary. Objection sustained. Plaintiffs except.

Mr. NASH: I asked for it in divisions, and now I am asking for it united as one property.

The WITNESS: I would have to figure on that before I could tell the exact amount.

Q. Would it change your estimate of the value of that property as you have described it by piecemeal?

A. By what?

Q. In the different divisions would it change the value at all as a whole; would it be more valuable or less valuable?

A. To take it as a whole?

Q. Yes.

A. I don't think it would.

Q. That fixes the value of this property in 1889. Now, I will add to that. How was it as to values the latter part of the year 1888, say in the fall of 1888, if any difference in the valuation, just simply say what it is, if there was any difference.

Same objection; same ruling. Defendants except.

A. I don't think it was worth quite so much.

Q. Well, how much difference would there be in the valuation of the property?

A. I don't think in 1888 that property was worth to exceed $600 per front foot, the Riverside Avenue property.

Q. The Riverside Avenue property as a whole?

A. Yes, sir.

Q. Now, then, the corner on Stevens, what would that be worth?

A. The corner lot?

Q. Yes.

A. In 1888?

Q. The latter part of 1888, in December, fix that as the time.

Mr. HUGHES: If the court please, it seems to me this is in the nature of a cross-examination of his own witness. He has
170 testified as to the value. There is no need of the witness being required to sever it, unless the cross-examiner wishes to test him in that respect. It is repetition.

The COURT: I think not. Let him answer.

A. I think take the corner of Riverside avenue and Stevens in the latter part of 1888, and it is possible that corner would have been worth $750 per front foot, take the corner alone.

Q. At that time?

A. Yes, sir.

Cross-examination.

By Mr. HAPPY:

Q. Mr. Glover, did you sell this property to Mr. Tull?

A. Yes, sir.

Q. Do you remember what year you sold it?

A. I think it was the spring of 1886; I would not be positive; I could not tell the exact date; that is my recollection, as near as I can place it now.

Q. There was first a contract for a part of this property?

A. It was first a contract, but the contract did not run very long; the contract did not run a great while; from some time in the spring

until the summer season, I think the contract was in existence; it run three or four months.

Q. You think the contract was in the spring of 1886?

A. That is my recollection now.

Q. Wasn't it in December, 1886, December 28, 1886?

A. It is barely possible, Mr. Happy; I could not say positively the dates; it was along about the year 1886, some time; I would not say what time of the year positively, nor what date, but it was about that time in the 80's.

Q. Did that contract include the whole of the property that you sold to Mr. Tull, or only a part of it?

A. Well, there is another thing I could not answer for sure, just what the size of the property that I sold to Mr. Tull was; I think that I sold him—I know there was a piece running along—he did not take the entire property that I formerly owned there, but
171 there was an "L" or a piece of it ran back onto Sprague street, 180 feet deep, 179 and a fraction, but just the size of the property that I sold to Mr. Tull; I could not say now positively; my recollection is that it was about—let me see; it seems to me it was about 90 feet on Riverside avenue and 60 feet on Sprague, or 30 feet on Sprague; I could not say positively; it has been too long for me to remember.

Mr. NASH: You are getting pretty close to it.

The WITNESS: I had sold a piece, I know, before I sold to Mr. Tull; I sold a piece at the corner of Stevens and Sprague to another party. I would not swear positively about the ground, as I stated before.

Q. Have you got fixed in your mind now how much property and what property was included in the contract that you made with Mr. Tull?

A. No, sir, I have not.

Q. (Handing paper to witness.) Now, here is what purports to be a certified copy of that contract that has been introduced by counsel on the other side. That will refresh your recollection as to the date, and perhaps as to the particular property?

A. That is the particular property yes, sir.

Q. The date of it is December?

A. December 28, 1886.

Q. So that it was not the spring of 1886?

A. No, sir, I would not swear positively, Mr. Happy, with regard to the date; I could not do that.

Q. Now, then, as to the particular property?

A. It is lots 5, 4 and the west half of lot 3; here is is given in the deed.

Q. That would be 90 feet on Riverside avenue?

A. No, that would be 150 feet on Riverside avenue; if that description is correct it is 150 feet. Those lots are 60 feet, there is 4, 5 and the west half of lot 3; that would be 150 feet.

(By Mr. HUGHES:)

Q. 150 feet frontage on Riverside avenue?

A. On Riverside avenue, yes, sir, if that is correct.

(By Mr. HAPPY:)

Q. That includes the whole of this property that the Tull block is situated upon?

A. I presume it does, Mr. Happy; I could not say positively in regard to that; I don't think that I sold Mr. Tull the entire—lot 5 would be a corner lot, I think.

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Q. Yes, it excepts a piece of lot 5 that had been conveyed to Nelson Clark; this description excepts that?

A. Yes, sir, I guess that is just the way this deed was made.

Q. This instrument here expresses correctly the consideration, does it, which was paid for that property?

A. Yes, sir, that is correct.

Q. Was that a fair price for it at that time?

A. Considered a fair price at that time, Mr. Happy.

Q. That was December, 1886?

A. 1886, yes, sir.

Q. What was the population of this place at that time, Mr. Glover?

A. Well, that is another pretty hard question. Spokane was growing very rapidly along about those times, and I could not state accurately anything with regard to the population then.

(By Mr. NASH:)

Q. What years, Mr. Glover, was real estate the highest?

Objected to by defendants as leading, immaterial and irrelevant, and not direct examination. Objection sustained. Plaintiffs except.

(By Mr. NASH:)

Q. Isn't it a fact that during the years mentioned, 1888, 1889 and 1890, Spokane real estate reached its highest market price?

Objected to by defendants as leading and not redirect examination.

Mr. NASH: With the permission of the court it may be direct examination.

Objection sustained. Plaintiffs except.

Witness excused.

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F. M. TULL.

Cross-examination resumed.

By Mr. HAPPY:

Q. Mr. Tull, I believe you testified in your direct examination that you lived in Kansas prior to coming to this State?

A. Yes, sir.

Q. You had been in business in Kansas for some years before you came to this place?

A. Yes, sir.

Q. I believe that you testified you were married in 1871, was it?

A. 1871, yes, sir.

Q. And were you in business in Kansas for many years prior to your coming to this State?

A. I did not testify, I don't think, as to that, at the time. I was in Kansas about something like 10 years, I think.

Q. And living at Kingman, Kansas all of that time?

A. No, I lived at Harper, Kansas a part of the time.

Q. How long did you live in Kingman before coming to this State?

A. I landed in Kingman, first located in Kingman a couple of years, I think two or three years, and then went to Harper and staid two or three years, and then came back again; I suppose I was in the town of Kingman six or seven years, something like that, both times I was there.

Q. You were in business in Harper and in Kingman county?

A. Yes, sir, Harper and Kingman both.

Q. During the times that you have mentioned what business were you engaged in, Mr. Tull?

A. Furniture.

Q. Furniture. At what time did you say you closed out your business in Kansas?

A. In the fall of 1886.

Q. Of what did your property consist at that time, Mr. Tull?

A. Our stock of furniture and two or three pieces of business property there that I had.

Q. Of what value?

A. The total amount you mean?

Q. Yes.

A. Why, I don't know exactly, but I had something in the neighborhood of $25,000 when I settled up everything.

174 Q. When you settled up everything and came to this place?

A. Yes, sir.

Q. That was the proceeds of your property accumulated in Kansas?

A. Yes, sir.

Q. And brought by you to this place?

A. Yes, sir.

Q. $10,000 of that money you invested in this property here, did you?

A. Well, I had contracted for it, I did not pay it all down then; all of that was not paid for until a year afterwards.

Q. But paid for it shortly afterwards?

A. About the next following year; I only paid part of it at the time.

Q. How much did you pay down on this property at the time the contract was made?

A. I think $100; it strikes me it was $100 or something like that; I paid a small payment at the time of the contract, until I came out here, and then I went to building. He deeded part of it to me first and kept possession—I don't know just exactly what way it was done—at any rate—I forget—I only got a deed of part of the prop-

erty and Mr. Glover held either the contract or mortgage back, I don't know which, for the balance of the purchase-money, for some time afterwards.

Q. Well, he delivered to you a contract at the time that you made this contract with him on the 28th of December?

A. Yes, sir, I got a contract.

Q. You had that contract?

A. Yes, sir.

Q. And had it recorded?

A. I don't remember.

Mr. HAPPY: Well, the record shows that it was recorded.

Q. And your recollection is that he deeded a part of that property to you at one time, and part at another time?

A. Yes, when I went to building the first building in May or June—I think I commenced—I think he deeded that part and I got a mortgage from the Sun Insurance Company on that building, and I had to have a deed, and I think he kept—he either kept the deed or else took a mortgage back for the remainder. I only paid him part; I could not say what part; I only paid him for part of it that spring, and later in the fall, that is, when I got the mort-
175 gages—I guess I didn't pay him until I got the mortgage; I don't think I paid it all up until I got the mortgage from the German Savings and Loan Company; I don't think I did all of it.

Q. The execution of that first deed there then would indicate about the time that you commenced to erect the first building on this property?

A. I think so.

Q. And the buildings that you were erecting at that time was that part of the property that was deeded to you by Mr. Glover?

A. It was deeded first; I don't know what time it was deeded; I don't know whether I commenced before it was deeded or not; I could not say.

Q. It is not likely that you did, is it?

A. Well, no, I know the time I commenced building, but the deeds will show when it was deeded.

Q. The deeds will show when you got your deed, but they don't show when you commenced to erect your building?

A. I commenced the building in June.

Q. Anyway it is not likely that you would have commenced erecting a building until you got a title, was it?

A. Well, I had a bond for a deed; I might have commenced building, you know, before I got a warranty deed.

Q. As a matter of fact, did you commence to build before you got that deed?

A. That I could not say, Mr. Happy.

Q. What is your impression about it?

A. I have no idea whether I got the deed before I commenced to build or after; I know the time I commenced to build, but I don't know the time I got the first deed.

Q. How is that?

A. I say I know about the time I commenced to build.
Q. When was that?
A. That was in June, 1887.
Q. In June, 1887?
A. Yes, sir.
Q. Where was that building erected?
A. On the east 50 feet of the property in litigation now.
176 Q. Did it extend back to Sprague street or only——
A. (Interrupting.) No, 100 feet.
Q. 100 feet?
A. Yes, sir.
Q. Then the first building you started to erect was 50 feet fronting on Riverside by 100 feet running back?
A. Yes, sir, on the east side.
Q. And it was 100 feet from the corner of Riverside and Stevens street?
A. Yes, sir, that is right, corner of Riverside and Stevens.
Q. Now, you don't remember when you got your deed for the balance of that property?
A. No, sir, I could not tell you; I don't think I could tell you within months of when I got that deed; I have no knowledge; I haven't refreshed my recollection; I haven't thought of it since.
Q. The records will show, I suppose?
A. Yes, sir.
Q. When was your building, the one you first begun to build, completed?
A. That was completed—I opened up my stock of furniture in August the same year.
Q. So that it was finished before that time?
A. Yes, about the first of August.
Q. About the first of August. How long after that before you commenced to erect a building on the other property?
A. The next spring after that, the spring of 1888.
Q. In the spring of 1888?
A. Yes, sir.
Q. You had before that time obtained a deed from Mr. Glover upon that property?
A. I really doubt that, because my money was tied up in
177 this other building, and in the furniture stock, and I rather think Mr. Glover held a mortgage on it at that time; that is my impression.
Q. Whatever money you had, you brought with you from Kansas, was tied up in that building and in the payment you had made on this property?
A. Yes, sir and in the furniture stock.
Q. Do you remember how much remained to be paid to Mr. Glover after the first deed was made to you?
A. My recollection is that when I got the first deed I paid him $5000, and there was either a mortgage taken back or he held the contract. I don't know which, and $5000 the last——
Q. $5000 was paid afterwards?

A. Yes, sir; that was not paid, I don't think, until I got the loan, about the time that I got the loan.

Q. Then the remaining $5000 you think was paid out of the money that you borrowed from the German Savings and Loan Society, the $40,000?

A. I am inclined to think it was.

Q. You are not positive about that, but you think it was?

A. Yes, sir.

Q. So that this property was all paid for, either out of money that you brought from Kansas, or money that you borrowed from the German Savings and Loan Society; that is right is it?

A. Yes, sir.

Q. I understood you to say, Mr. Tull, that the $25,000 that you brought here was the result of your business management while in the State of Kansas?

A. Yes, sir.

Mr. MURRAY: I beg your pardon for interrupting, you said $25,000; the witness previously said $20,000.

The WITNESS: I said in the neighborhood of $25,000, I don't remember.

178 Q. The first time you came here, Mr. Tull, was December 28, or some time in December, 1886?

A. Yes, sir.

Q. I think you stated that you were back here two or three times, perhaps, after that?

A. Yes, sir.

Q. When was the first time after your December trip to Spokane?

A. I could not tell you the date, Mr. Happy; it was in the spring afterwards; about April, I think, something like that.

Q. You think it was along in April?

A. Yes, sir.

Q. How long did you stay then, Mr. Tull?

A. I don't remember that.

Q. More than a few days?

A. Oh, a few days; two or three weeks, something like that.

Q. Two or three weeks?

A. Yes, something like that.

Q. Came here to finish making arrangements for the building, then you went away from here. Where did you stop while you were here—at a hotel?

A. I think I stopped at the California house.

Q. The California house was a hotel?

A. Yes, sir.

Q. Were you alone when you came here, Mr. Tull?

A. Yes, sir.

Q. Did you not bring your family with you?

A. No, sir.

Q. When you went away from Spokane, how long were you absent before you returned again?

A. I returned some time in May, I think, the last time to stay.

Q. I understand you to say, Mr. Tull, that you came here the last time, or returned the last time, in May?

A. Yes, sir, some time in May.

Q. Some time in May. After that time you remained here continuously during the time that you were erecting a building which you mentioned, the first building?

A. Yes, sir.

Q. And getting ready to go into business.

179 A. Yes, sir.

Q. And that you went into business, or started into business, I think, about August of that year?

A. Yes, sir; I came here and stayed until the first of July. On the first of July I went East to buy my stock.

Q. You went East to buy your stock. That was before your building was completed?

A. Yes, sir, before it was done; of course, we had the goods here at the time it was completed.

Q. I think you stated that Lucy A. Tull, your wife, died July 18, 1888?

A. Yes, sir.

Q. That was the following year after you came here?

A. Yes, sir.

Q. Before that time, Mr. Tull, you had begun erecting a building on the remaining property that you had purchased from Mr. Glover, I believe?

A. Yes, sir.

Q. That is, that part of it lying between the building which you had erected and Stevens street?

A. Yes, I commenced it in the spring before she died.

Q. Do you remember what time in the spring?

A. Along some time in the spring; I don't remember when.

Q. Can you state how much progress you had made during the erection of that building before her death in July?

A. I think had the excavation done and foundation in and I think perhaps some material on the ground, I don't know, I don't remember as to the exact state of affairs; I might have commenced, possibly, on the first story, I don't remember; I know I was getting it under good headway.

Q. The excavation was dug, the foundation laid and you think possibly the first story——

A. (Interrupting.) Was commenced.

Q. What sort of a building was that, brick or frame?

180 A. Pressed brick and stone, a very nice building.

Q. Can you state from recollection now, Mr. Tull, about how much that building was to cost? What was the contract price?

A. That building cost something like about $75,000.

Q. About $75,000. That is, it was to cost that when completed?

A. Well, it was completed. I completed it afterwards; that is about what it cost.

Q. It did cost that, about $75,000?

A. Yes, sir.

Q. It was to be a 3-story brick building, 100 feet fronting on Riverside?

A. Yes.

Q. Going back to the depth of——

A. (Interrupting.) 95 feet, I think.

Q. 99 and a fraction?

A. No, I think the building was 95.

Q. It did not go back as far as the present Tull block goes?

A. No, not quite.

Q. 100 on Riverside, but about 95 running back?

A. Yes.

Q. Had you made any payments to the contractor or the material-men towards the erection of that building?

A. Oh, yes, I had paid considerable money out of my business; I don't remember whether I had sold at that time or not, but I was anticipating going out of business at any rate, and I was paying out of my business and finally sold my business out and put that money all into a building before I got the loan.

Q. That is, you were selling out your stock of goods and putting it into this building?

A. Yes, sir.

Q. You had made an application, however, before her death, to obtain a loan to enable you to complete the building?

A. Yes, sir.

Q. You did not have the means of your own?

A. I did not have enough to complete it.

181 Q. To complete that building?

A. No, sir.

Q. Even by selling out your stock of goods?

A. No, sir.

Q. By what time had you sold out your stock of goods?

A. Well, it was about the time of her death; either a little before or a little after; I was in business I think, just a year; I started in August and I think I went out in August; I might have contracted, possibly, to sell out before that; I don't remember as to that, but along about that time I went out of business.

Q. Do you remember, Mr. Tull, about what time you first made application and to whom you applied for that first loan of $40,000?

A. Well, I think it was in the spring some time; I could not tell the date; Mr. Cutter offered to secure me a loan; I don't know how the proposition came up between him and I; I done the business with the bank; at any rate, he offered to get me some money, and a week afterwards Mr. Goldsmith came up and looked the property over and I made an application then to Mr. Goldsmith.

Q. Mr. Cutter was the cashier of the First national bank?

A. Yes, sir.

Q. Did you keep your deposit in that bank?

A. Yes, sir, I did at that time.

Q. And it was in that way that you happened to speak to Mr. Cutter about it?

A. I don't know exactly in what way, but at any rate he offered to secure me the loan; I don't know how it came about.

Q. Secure you a loan through Mr. Goldsmith?

A. I can't say as to that.

Q. Did he state whom the loan was to be secured to?

A. He said it would be from the German Savings and Loan Company; I don't know whether he said Mr. Goldsmith; at
182 any rate Mr. Goldsmith came up and looked the property over.

Q. (Handing witness paper.) I will ask you to look at that paper and state if that is your signature?

A. Yes, sir, that is my signature.

Q. That has reference to that same $40,000 loan, has it not?

A. Yes, sir, I think it has.

Q. You think it has?

A. Yes, yes; I think that is an application for the loan. (Examining paper.) Yes, sir.

The paper referred to is marked for identification Def'ts' Ex. "A."

Q. That loan that was mentioned in that application had not been consummated at the time of Mrs. Tull's death?

A. No, sir.

Q. And after that time these proceedings that you have testified in reference to in the probate court, took place?

A. Yes, sir.

Q. The condition that the property was in at that time, Mr. Tull, made it absolutely necessary that you should get a loan on the property, didn't it?

A. Yes, sir.

Q. You may state to the court what the necessity was, if you will.

A. Well, the building was partly constructed and simply meant laying idle if I did not borrow money.

Q. What would have been the consequences if you had not borrowed the money?

A. I could not tell as to that; of course, there would have been a loss; I suppose I would have had to sell it out to some one else.

Q. If you could not have sold it out were you threatened with mechanics' liens proceedings, or anything of that sort?

A. No, I had paid for for about as far as I went, with the money that I had.

Q. But it was necessary to get this money in order to——

A. (Interrupting.) Complete the building.

Q. Complete the building so as to make it productive?

A. Yes, sir.

183 Q. The sale that took place by the guardian was a public sale and not a private sale?

A. I suppose it was a public sale, yes.

Q. You say that you and your brother and Judge Houghton were present when the first sale took place?

A. Yes, sir.

Q. That was of the corner property, was it?

A. The corner property.

Q. That was the property that had on it just this partially erected building?

A. Yes, sir.

Q. Judge Houghton was one of the firm, was he, representing the guardian in that proceeding?

A. He is one of the——

Q. (Interrupting.) One of the attorneys?

A. One of the attorneys that I had employed.

Q. That is, you mean to say that you furnished the money to pay the attorneys for attending to these proceedings?

A. I did pay them myself.

Q. There was no one else to pay them if you did not?

A. Well I made a contract with them to go ahead with this case and paid them; that was all there was to it. I don't know who might have paid them if I did not.

Q. Where did those sales that you mentioned, the first and second sales by the guardian, take place, at the court-house?

A. No, sir.

Q. On the property?

A. I think it was near the property, I don't know whether it was on it or in front of it; up that way, near the property.

Q. At the time the first sale took place, Mr. Tull, I will ask you to state what you were worth over and above your indebtedness?

Objected to by plaintiffs as immaterial. Objection overruled. Plaintiffs except.

A. At the time of the first sale?

184 Q. Yes, at the time that $14,000 sale was made, and I will include in that question, the time that the $14,000 note and mortgage were given to the guardian.

A. Oh, I had about $25,000, when I came there, and I think that my profits was about $10,000 in the business; that would be $35,000, and then, of course, the value of the property came in there.

Q. The increase?

A. The increase of the total property?

Q. Yes, the increase in the value of the property.

A. Well, I would say that the property was worth $100,000 at that time, and my half of it was perhaps worth fifty, and that would be besides the money that I had.

Q. Besides the what?

A. Besides the money that I had in the business.

Q. Besides the money that you had, besides the $35,000?

A. Yes.

Q. That is, you think $50,000 plus $35,000, which would be $85,000 over and above your indebtedness?

A. Yes, sir, that would be about right, at that time. That is about what I think the property had increased at that time.

Q. Now, about a year after that, or some time the next year, when this mortgage was given, note and mortgage for the $34,000, were

you worth any more or any less at that time, than you were when the $14,000 note was given?

A. I think I was worth the increase of the property; the property was increasing.

Q. Well, how much had it increased in value?

A. That was after the fire, I think, when that was sold, is my recollection. Just after the fire the property was about at its highest then; I think that property was worth $150,000 at that time, the total of the property.

Q. All of the property?

A. That is, the land was worth that at that time.

185 Q. That is, after the fire?

A. Yes, sir.

Q. How much incumbrance was there on it? I will withdraw that question and ask you to state now at the time that second mortgage was given, that is, the $34,000 note and mortgage were given, what was a fair estimate of your financial standing, how much were you worth over and above your debts and liabilities at that time?

A. After the fire, about the time of the sale you mean?

Q. Yes, when the second sale took place, at the time the second mortgage was given. That was in December, 1889, as I remember it?

A. Well, I think it was worth $150,000 less the indebtedness of the $34,000, which I had contracted for, I think the property was worth—that is, about what I had left after the fire—I think it was worth $150,000 at that time; and then I had put in this part of it at $34000. I suppose I was worth in the neighborhood of $100,000 at that time or a little more.

Q. That is, $100,000 above all of your debts and liabilities?

A. Yes, sir.

Q. When the application was made for the $50,000 loan the fire of August 4th had taken place and all of the buildings that you had erected there had been totally destroyed, as I understand it?

A. Yes, sir, $50,000, I think.

Q. That is the second loan that you obtained from the German Savings and Loan Society?

A. Yes, sir.

Q. There was nothing that remained on this ground at that time except the ruins?

A. Some brick; I got considerable good brick. There was nothing except some brick that I got off that I used.

Q. The foundation, was that good?

A. Well, I used a part of the foundation.

186 Q. Had you any ready cash on hand at that time, Mr. Tull, with — to restore those buildings?

A. No, sir.

Q. You had some insurance on these buildings?

A. I had some $5000 insurance I collected, I believed, and what I got out of the ruins there to go on, that is all, and the land.

Q. That is, there were some of that old material that you could use?

A. Which I used.

Q. That you could use towards erecting another building?

A. Yes, sir.

Q. But aside from this $5,000 of money you had no money with which to restore those buildings?

A. No, sir.

Q. The first money that you borrowed then, after the fire, was $50,000?

A. Yes, sir.

Q. From the German Savings and Loan Society?

A. Yes, sir.

Q. You may state what use was made of that money after you got it. You got that money, $50,000?

A. Yes, sir, to put into the building.

Q. What building? Where was it?

Mr. MURRAY: I think I will object to this line of testimony as immaterial. I think the whole object of this line of testimony is immaterial. I object now to that question.

Objection overruled. Plaintiffs except.

A. The first building I built after the fire was 100 feet on the corner, 5 stories high, 50 feet one story high. I dropped that off at one story, and went on with the 100 feet front 5 stories high and finished the lower part out of that money, and waited until winter. I did not have enough money to complete the building.

Q. You had exhausted the $50,000?

A. Yes, sir.

Q. And it only went far enough to complete the lower part of it?

A. Yes, sir, the lower part of it.

187 Q. It erected the walls, I suppose?

A. Yes, sir, and the roof.

Q. It was enclosed?

A. Enclosed, yes, sir.

Q. But above the first story it was not plastered or finished?

A. No, sir.

Q. And the $50,000 was gone?

A. Yes, sir.

Q. That included the 100 feet 5 stories high?

A. Yes, sir.

Q. Running back 99 and a fraction feet?

A. Yes, sir.

Q. And a one-story building on the 50 feet fronting on Riverside, running back the same distance?

A. Yes, sir.

Q. Nothing on Sprague street?

A. No, sir.

Q. Then you borrowed shortly after that, some time after that, the next year, you borrowed from the German Savings and Loan So-

ciety $25,000 additional and gave a mortgage on the 50 feet east of this 5-story building that you had erected?

A. Yes, sir.

Q. What use did you make of that money?

A. I finished the first building that I built.

(By Mr. HUGHES:)

Q. Finished the first what?

A. Finished the first 5-story building with that money that I had partly completed the fall before.

(By Mr. HAPPY:)

Q. You say you finished it, Mr. Tull. When you erected that building, it was brick and the outside stuccoed?

A. No, I mean the inside; I did not finish the outside for a year or two afterwards.

Q. But the inside, finishing of the upper floors exhausted the $25,000 you borrowed?

A. Yes, sir.

Q. On the third mortgage which you gave to the German Savings and Loan Society?

A. Yes, sir.

Q. The next loan you made, Mr. Tull, was for $100,000 from the German Savings and Loan Society. What use was made of that money?

188 A. Taking up, of course, the $75,000 mortgage.

Q. The two mortgages, one for $50,000 and the other for $25,000?

A. Yes, sir, and the additional $25,000 I built a 50-foot building with; that was left one story; I finished that up 5 stories high.

Q. It was used for that purpose, and the next loan that you got was for $20,000?

A. Yes, sir.

Q. I ask you to state what was done with that money?

A. I took up the loan of $10,000. During the construction of this building I placed $10,000 on the Sprague Street property from some other company, and had used that money also in the building in connection with what I had been borrowing from the German Savings, and then when I got the additional $20,000 from this company I took up that $10,000 and built a three-story building on the Sprague Street property with the other ten.

Q. You erected what is called the Vendome building?

A. Yes, sir.

Q. On Sprague street?

A. Yes, sir.

Q. So that all the money received from the German Sacings and Loan Society upon those various loans has been used up in erecting these buildings that now stand upon the property?

A. Yes, sir, and all the rents and profits I got besides.

Q. You have stated, Mr. Tull, that at the time of these various

loans by the German Savings and Loan Society, that Mr. Kinnaird was not representing you as an attorney, was not employed by you?

A. No, sir.

Q. Did you have an attorney representing you in these transactions?

A. I had Messrs. Houghton, Graves & Jones to do this probating.

Q. Yes, but I mean in reference to these loans from the German Savings and Loan Society.

A. No, sir, I had no attorney.

Q. You had no attorney to represent you?

A. No, sir.

189 Q. To pass on the sufficiency of those notes and mortgages?

A. No, sir.

Q. To see whether they conformed to the contracts that you entered into?

A. No, sir; I always submitted them to Mr. Kinnaird and whatever he said went with me. I was after the money; I wanted the money and I was trying to satisfy him to get the money.

Q. Whatever he said was satisfactory to you?

A. Yes, sir. I signed the papers as he got them ready for me.

Q. You don't know from whom he received these papers, if he received them?

A. I don't know who he received them from.

Q. And you can't, from your own knowledge of the matter, swear whom he represented in the matter. You simply swear that he was not employed by you personally to attend to this business?

A. Yes, sir, I know that he was not employed by me; of course, I suppose he was representing the company.

Mr. HAPPY: You need not state what you suppose.

The WITNESS: I went to him to do my business, that is, for information in regard to what I should do to get the money; that is all I do know about it. I have no knowledge to know that they employed him.

Q. So far as you remember now, Mr. Tull, was there anything further to do when these notes and mortgages were presented to you—was there anything further than for you to execute the notes and mortgages and thereafter you to receive the money?

A. No, not after they were ready to sign, there was not.

Q. Now, after you had made your application for a loan, and you had received information that the loan had been granted, and had been notified that the papers were ready to execute, you were notified I suppose that the papers were ready to be executed and

190 you went and executed them, and after that your money came either through the First national bank, or to you direct?

A. Yes, sir.

Q. That is correct, is it?

A. Yes, sir.

Q. You were not present at any time when any of these notes and mortgages were drawn up?

A. No, I don't think I was; I don't remember I was; I don't remember.
Q. You don't know where they were drawn, nor by whom?
A. No, I do not.
Q. One of these mortgages, I think you said, was drawn up by Kinnaird, that is the $20,000 mortgage?
A. I don't think I said so.
Mr. HAPPY: Didn't you? I thought you did. I understood him to say that it was. I wanted to correct that.
The WITNESS: No, I never said it.
Q. Wasn't it a fact, Mr. Tull, that in all these loans that you got from the German Savings and Loan Society you were required to furnish them with an abstract of title to the property that was offered them for security?
A. Yes, sir.
Q. Will you state who attended to getting those abstracts, at whose request those abstracts were gotten out, either by you, were they not, or by some——
A. (Interrupting.) I ordered them from the abstract company.
Q. Either in person or by somebody else?
A. Yes; I know I had to pay for them.
Q. Yes, you had to pay for them, and if any one else ordered an abstract it was at your instance, was it not?
A. Well, I suppose that is true. I know that they required an abstract, and I got them out and paid for them, at any rate.
Q. Whom did you pay?

Objected to by plaintiffs as immaterial. Objection over-
191 ruled. Plaintiffs except.

A. The abstract company, I think.
Q. Whoever got out the abstract?
A. The man I contracted with.

Thereupon court is adjourned to 2 o'clock tomorrow afternoon.

SEPT. 17, 1898—2 o'clock p. m.

Court convened pursuant to adjournment and the trial of the case proceeded as follows:
The witness F. M. Tull is here withdrawn for the purpose of taking the testimony of Mr. Frank H. Graves.

FRANK H. GRAVES, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. NASH:

Q. Your name and occupation, Mr. Graves?
A. Frank H. Graves; practicing lawyer.
Q. Were you in Spokane in the years 1888 and 1889?
A. I was.
Q. What was the style of your firm at that time, Mr. Graves?

A. Houghton, Graves & Jones.

Q. Do you remember a proceeding in the probate court entitled, "In the matter of the guardianship of William L. Tull?"

A. Yes, I remember the Tull probate proceedings.

Q. I will ask you to examine these two petitions and say if you can in whose handwriting they are.

A. That is my handwriting; I can tell that from here.

Q. This petition is Plaintiffs' Ex. "9;" there appear to be interlineations upon this petition, Mr. Graves, in a handwriting
192 other than your own. I will ask you to look at these interlineations and say, if you know, who put them on that paper.

A. I think I know (examining paper). Yes sir.

Q. Who put them on?

A. J. M. Kinnaird, deceased.

Q. Who is J. M. Kinnaird?

A. He was a lawyer practising here at that time and subsequently judge of this court.

Q. Explain how and under what circumstances and the facts fully as to why that interlineation appears upon the face of that petition.

A. Well, do you want I should recount the history of this proceeding and Judge Kinnaird's relation to it, and mine, or just answer categorically your question?

Q. You can state the facts leading up to the execution of that interlineation. Go on in your own way.

A. Some time in the year 1888, I suppose about the date that this petition was sworn to, some time before this petition was sworn to, Mr. F. M. Tull came to our office, whether to consult with me individually or not I don't remember; but after some consultation I did individually take charge of the matter. He represented to me that——

Mr. HAPPY: I wish to interpose an objection here as to any conversation between Mr. Tull and Mr. Graves, so far as the German Savings and Loan Society is concerned, as purely hearsay and incompetent, irrelevant and immaterial.

Objection overruled. Defendants except.

A. (continued). He represented to me that he was building, had commenced that summer, which I knew, of course, to erect a building upon his property, which we then knew as the Glover property; that for the purpose of erecting that building he had arranged to borrow money of the German Loan and Savings Society of San Francisco——

193 Mr. HUGHES: The German Savings and Loan Society.

A. (continued). Well, it is this German institution that has been loaning money here. That he had already proceeded part way in the erection of the building, that the mortgage had not been executed when Mrs. Tull had suddenly taken ill and died; the mortgage being unexecuted, that the company had refused to accept an execution of the mortgage by him alone; that he could not go on with the building unless he got this money; that he was then indebted for

material and labor in considerable sums of money and no way of liquidating that indebtedness, and that the property would undoubtedly be sacrificed. He desired to devise some way by which the property could be saved, both for his minor children and himself, and desired advice in respect to that matter. I subsequently did advise him. He also said to me that any proceedings that were taken would have to be subject to the approval of Mr. Kinnaird who, he said, represented the company.

Q. What claim, if any did Mr. Kinnaird make?

Mr. HUGHES: I move that the statement of the witness that Mr. Tull said Kinnaird represented the company, be stricken out as mere hearsay and incompetent proof to establish agency.

Motion denied. Defendants except.

A. Subsequently Mr. Kinnaird—Mr. Tull employed me——

Q. Employed you?

A. Employed me, and subsequently Mr. Kinnaird called upon me; whether I saw him and mentioned it, or whether he came over to my office, I don't know, but anyhow, Mr. Kinnaird and I got together and I outlined to Mr. Kinnaird a plan that I thought would save the property, the children's interest, for them, and Mr. Tull's interest for him, and Mr. Kinnaird, I discussed it with him and he approved of it and said that, as far as he was concerned he
194 would pass the title. He either said at that time or said subsequently, that he would have to communicate it to counsel at Portland, or San Francisco, my recollection is now Portland, and that the counsel were Cox, Smith & Teal, but I won't be perfectly sure of that, and either at that time or at some subsequent stage of the proceedings, and I think at that time, proceedings were delayed until he was able to communicate with them, advise them of the nature of the proceedings that were to be taken, and receive a reply from them. Subsequently he did, he told me he had received a reply, and held in his hand what he said was a letter from the attorneys, while we discussed the thing at some length. Now, I don't know whether that was before any proceedings were taken, or whether that was at some stage in the proceedings, I don't know at all about it, but somewhere along there that was done. I then drew—had Mr. P. D. Tull appointed guardian at the suggestion of Mr. Tull, and bond given, and then drew the petition which has been handed me (Pl'ffs' Ex. "9"), which was submitted to Mr. Kinnaird, and he made the interlineations that appear on the—well, all of the interlineations, I believe, that appear in it; at least these interlineations that appear on next to the last page, that were pointed out to me.

Q. Can you decipher the interlined words?

A. Yes, sir; the words, "or discharge the liabilities for labor and materials already placed thereon;" and the words, "is in such condition that no rents can be derived therefrom and that the labor and materials placed thereon will be lost and said real estate;" he interlined those words. That petition was then filed and subsequent

proceedings taken. That is how Mr. Kinnaird came to make those interlineations.

Q. I will ask you if, at the conclusion of every step in the probate proceedings Mr. Kinnaird expressed his approval or disapproval of the acts and the papers filed?

195 A. Oh, I don't know about that; Mr. Kinnaird was consulted by me as to every material step that was taken, but I don't suppose that I consulted with him, or that he expressly approved every detail of it. I think Mr. Kinnaird would have trusted me to carry out our plan, but Mr. Kinnaird knew what was going to be done, and knew what had been done after it was done, and approved of it.

Q. He was representing himself to be acting in the capacity of attorney for the German Savings and Loan Society?

A. Oh, yes, he had no other——

Mr. HUGHES: I object to the question as calling for hearsay testimony and as not competent evidence to establish agency.

Objection overruled. Defendants except.

A. (continued). When I say he represented himself, I don't mean —I am not sure that he ever said in so many words to me that he was the attorney for the company, but he was there in that capacity, professing to represent them. I understood he was representing them. He had no other business connection with it, except as the attorney, and I dealt with him as the attorney, and he dealt with me as Mr. Tull's attorney. Now, if you can understand how attorneys understand each other's relations without it being—I never put the categorical question to him, nor received the categorical statement, that I remember; I understood him to be representing them, and it was in that capacity I dealt with him; not otherwise.

Q. Do you remember the period that Judge Kinnaird occupied the bench in this county?

A. He was appointed some time in the spring of 1890, I think. My recollection would be soon after the legislature that year adjourned; anyhow, it was that spring.

Q. And thereafter your firm then consisted of Senator

196 Turner and yourself?

A. The firm, from March, 1890, that I belonged to, was Turner & Graves; the firm of Houghton, Graves & Jones, was dissolved on the first day of January, 1890; the firm of Turner & Graves was organized in March of the same year; I was a free lance between those two dates.

Q. Your firm then became the attorneys for the German Savings and Loan Society?

A. Very soon after Judge Kinnaird went upon the bench we were retained by this company; I don't remember the legal corporate title of it. We acted as their attorneys until Judge Kinnaird retired from the bench, when he resumed—I think soon after he retired from the bench he became their attorney again. I want you to understand, gentlemen, all of you, that I don't wish to be held to too great accuracy of dates here.

Q. (Handing witness paper, Ex. "17.") Look at that; examine that instrument, Mr. Graves, and look at the signature of the notary especially, and the witnesses on the other side.

A. Yes.

Q. Do you know anything about the execution of that paper?

A. What is it? (Examining.) No, I don't know anything about it. No, sir, I don't remember of knowing anything about it now. It might be that I did at the time; I hardly think so.

Q. What, if any, connection had Mr. Kinnaird with that?

A. I don't know, except what appears on the face of it.

Q. Is that his signature there?

A. It is his signature as a witness and as a notary public.

Q. (Handing witness paper.) Examine that paper.

A. Yes.

Q. Do you know Mr. Horace Cutter?

A. Very well, sir.

Q. What business was he engaged in in 1888 and 1889?

A. He was the cashier of the First national bank of this city.

197 Q. Do you know anything about his agency of the German Savings and Loan Society?

Objected to by defendants as assuming the existence of an agency, which is a matter of proof. Objection overruled; defendants except.

A. Well, sir, I know this about it, I know that during this Tull business that my attention has been called to, Mr. Cutter was professing to act as the agent and I had consultation with him at one time with Mr. Kinnaird, possibly more than one time, but one time that I remember of. I know that Mr. Cutter came to us before the receipt of this letter and desired to know if the German Savings and Loan Society could retain us to do their business, that subsequently we received this letter which you hand me, and that subsequently Mr. Cutter did bring the papers named in this letter, and that subsequently in our relations to the company as attorneys, we dealt with Mr. Cutter as the company's agent; that is to say, that Mr. Cutter—I don't know whether he made the loan, but he always brought the loans to us, the abstract of title, and so on, for examination. Well, now, I don't want to be understood as saying that positively; my impression is that he would bring the abstracts to us; at all events, he consulted with us and we dealt with him as the agent of the company in making a number of loans and doing the company's business. I can recall some of the loans now, but probably not all. I have not seen that letter since it was received, until just now.

Mr. L. G. NASH: We offer in evidence a letter dated June 18, 1890, addressed to Messrs. Turner — Graves, at Spokane Falls, by Mr. George Tourny, secretary of the German Savings and Loan Society.

Mr. MURRAY: That is for the purpose of bearing on the

198 question of Cutter's agency.

Objected to by defendants as irrelevant and immaterial to

any of the issues in this case. Objection overruled. Defendants except.

The paper is received in evidence and marked Pl'ffs' Ex. "45." See ex. at page 465.

Q. In the conduct of the business of the German Savings and Loan Society, was it customary for your firm to transmit any of the title papers to other attorneys for their opinion?

Objected to by defendants as irrelevant and immaterial, and calling for a custom and not for any facts relating to this transaction and incompetent, and confidential matters that are not the subject of evidence in the trial of a case, without the consent of the client.

The COURT: I think the last objection is well taken, that it is confidential communications.

Plaintiffs except.

Q. This is Plaintiffs' Ex. "22," and is a petition for the sale. That is in your handwriting, also, is it not, Mr. Graves?

A. Yes, I can tell that from here. Those are the days when I could not afford a stenographer.

Q. In the sale of that piece of property you followed the same steps and the same proceedings as you followed in the sale of the first piece, did you not?

A. Well, I presume so, Mr. Nash; I expect, having once blazed out a successful trail, that I did not establish a new one, but I would not want to answer that positively; I think so.

Q. Did Mr. Kinnaird have the same connections with that sale of that piece of property as he had with the first one, do you remember?

A. In a general way, yes; of course, Mr. Kinnaird said to me, just to put it through the same as you did the first one, and I got through it.

199 Q. I hand you Plaintiffs' Ex. "35" and Pl'ffs' Ex. "38," and ask you if you know anything about Kinnaird's connection with those papers and in what capacity he acted when those mortgages were executed.

A. I know nothing except what appears on the face of the papers; that is, of the first one. I will look at the other one (examining paper); I know nothing about it, except what appears on the face of the papers; this is Mr. Kinnaird's signature here; I know his signature. Mr. Kinnaird's signature to both of them, where it purports to be, both as a witness and one as a notary; that is all I know about that, except by hearsay.

Cross-examination.

By Mr. HUGHES:

Q. Mr. Graves, you say that when Mr. Tull employed your firm the matter came into your hands and you took charge of the conduct of these proceedings?

A. Yes, sir.

Q. Your negotiations, or your conferences—I mean the confer-

ences of your firm—were had on your part as a member of the firm and with Mr. Tull?

A. Yes, after the first consultation, at least; I don't remember about the detail of the first conversation, but I took charge of the business, anyhow.

Q. Now, you say that Mr. Tull explained to you the situation of his property, the fact that the loan was pending and uncompleted at the death of his wife, that the building was in course of construction, and there were claims that would result in mechanics' liens and in the ultimate sacrifice of the property, unless the loan could be consummated, and that he was advised it could not be consummated without some proceedings taken to make complete title to the property?

200 A. Yes—now——

Q. (Interrupting.) And give the loan company, the German Savings and Loan Society, a first mortgage upon the property, in pursuance of the original application?

A. Yes, sir. I want to say in that connection, Mr. Hughes, with your permission, that I suggested to Mr. Tull the question as to whether it really was community property or not, the money having been brought here from another State; I knew of no other reason why it was not community property, except the reason that the money was brought from another State—that question that you probably heard mooted—but that was disposed of without any consideration, because the mortgage company would not take title with any doubt of that sort; they had to have a clean title, hence Mr. Tull and Mr. Kinnaird both conceded at the outset it to have been community property, and the children to have a one-half interest in it, hence, I commenced with that assumption.

Q. You mean, it was conceded for the purpose of getting this loan?

A. No, it was conceded—well, on the part of Mr. Tull, conceded for that purpose; I suppose that of course Mr. Kinnaird had no—did not care whether it was or not; he was not going to take any chances; but it was assumed by all parties to be community property; hence, I gave myself no concern to that question, and did not inquire into any precedent facts. I started with the assumption that it was community property; Mr. Tull said he did not care much whether it was or not; he was perfectly willing that the children should have their interests in it, in any event, and I want to say, too, Mr. Hughes, with your permission, that when Mr. Tull employed me he said he employed me on behalf of himself and of the children, likewise, and I conceived there was no conflict between their interests.

201 Q. Now, why did you conceive there was no conflict between their interests? I ask that question for the purpose of determining the motives prompting these proceedings, and the course of the conduct of them, as to whether there was any fraudulent purpose connected with it.

A. Well, there certainly was not, on my part, nor none that I even suspected on the part of Mr. Tull; I am satisfied from what I knew then and now, that there was none. The reason why I conceived

there was no conflict was this: the children took Mrs. Tull's place in the property; their interest was an undivided one-half, and so was Mr. Tull's; their interests were identical; Mr. Tull had no money to go on with the building, neither had the children. Owing to what I conceive to be the power of a guardian under the law as it then was, I don't know what it is now, it was not within the power of a guardian, even with permission of the probate court, to make a mortgage; a mortgage had to be made after title passed into Mr. Tull. Mr. Tull was willing that the property should be sold in advance, testifying before the probate court that he would bid what its fair valuation was. Its fair valuation was established before the probate court by disinterested testimony, and I don't remember what it was, but I know that I considered at the time it was the fair value of the property, and I conceived, therefore, that there was no contest or conflict in his interests, and that of the children.

Q. Was that valuation the price actually paid or bid at the sale?

A. Yes.

Q. Was it, at that time, explained and made known to the court what was the character of the proceedings, and for what purpose they were inaugurated or instituted, and how they were to be
202 carried into effect?

Plaintiffs object for the reason the record will show. Objection overruled. Plaintiffs except.

A. The probate court fully understood the situation from first to last, and the means and the end in view; absolutely nothing concealed from him; the fullest explanation was made to him; the petitions themselves are a pretty full explanation of the situation and the purpose, and it was further explained to him the further steps of it were explained to him by testimony, and by a statement of counsel; they were not incorporated into the record, because they had no place there; there was the testimony which was not preserved, the evidence upon which the court acted.

Q. Was the money actually paid by Mr. Tull, at this time, and the time of this purchase?

A. Personally I do not know; I mean, I do not know in the sense that I either saw it paid or know of my own knowledge, except what was told that it was not paid, but I do know, so far as I can know a thing of that sort, that it was not.

Q. You understood that fact in the prosecution of these proceedings?

A. Yes, sir.

Q. What was the arrangement that was made in respect of that?

A. The advice which I gave Mr. Tull and the guardian, and the explanation which I made of it to the probate court was that Mr. Tull was perfectly good; if he was not, the bond of the guardian, Mr. P. D. Tull, was perfectly good for that money, until the first mortgage should go on and a second mortgage then be placed on to secure that money, and that course was taken with the knowledge and consent of Mr. Tull, the guardian, Mr. Kinnaird and the court,

Judge Hartson being the probate court, and the second mort-
203 gage was subsequently put on. The property, by everybody, was considered of very much more value than both mortgages; the second mortgage at that time being considered very good security.

Q. It was explained to the court that the mortgage to be given was to be a second mortgage, but was to cover the entire estate?

A. Yes, sir, the court understood that perfectly; I am told by Mr. *Happy that the record don't show it was to be a* second mortgage.

Mr. HUGHES: I think the record is silent upon that.

The WITNESS: I can't understand that, because it was thoroughly understood by the court and all of the parties, that it was to be first. The petition on its face says that the object of this was to give a first mortgage to your client—no other object in these proceedings.

Q. The same was true of the second petition and sale, and the subsequent mortgage taken in pursuance of it, was it. The second petition was after the fire, after the buildings were all burned down?

A. My recollection fails me when I come to that second proceeding; I don't remember much about it. I remember there was a second proceeding, and I see a petition for it, or what is stated to be the petition for it, is in my handwriting, and that is about all I remember of it. Perhaps if my attention was called to the details I might recall.

Q. The second petition asks the court on similar grounds, to direct — sale of the remaining property.

A. I don't want to speak about that until I read the petition, with your permission.

Mr. HUGHES: Yes, I would like to have you read the petition.

The WITNESS (examining petition): This is a different piece of property from the first, isn't it?

204 Q. Yes, the first is a part of the property bought of Glover, and this was the balance of it when he was making the larger building, the building after the fire.

A. I can't recall much about the second proceeding than what appears on the petition now. My attention had not been previously called to it.

Q. Your best recollection would be that the same course was pursued in respect to it?

A. I should presume so, yes, but I can't remember whether the——

Q. (Interrupting.) I will ask you whether there was anything concealed from the court regarding this petition, either with respect to what was to be done——

A. (Interrupting.) Well, I can answer that very fully, that there was not, at least if I put it through there was not.

Q. That is in your handwriting?

A. This is in my handwriting, and if I put it through there was nothing concealed, I warrant that; I was not engaged in any fraud on any minors, nor to the court; I will tell you that, and I did not think that Mr. Tull was, and don't think he was yet.

Redirect examination:

Q. The facts that are set forth in that petition, Mr. Graves, however, you got entirely from Mr. F. M. Tull, is that not a fact?

A. In this second petition?

Q. No, in the petition you relied upon him for the facts contained therein?

A. Why, in the main, yes.

Q. Mr. P. D. Tull had very little to do with the proceeding, as a matter of fact?

A. That is my recollection of it; after he was appointed guardian Mr. P. D. Tull used to consult me and was very solicitous, but I don't know—he said he didn't want to get into any trouble with it, and did not want to do anything but what was right. He
205 came up and talked with me about it several times—I don't remember—I don't think that he knew at first hand the facts. On the hearing before the probate court we examined a number of witnesses to establish the facts alleged in the—that is, the first one I remember distinctly about the hearing, remember where the office of the court was, and could recall, I think, some of the witnesses who were examined.

Q. The witnesses were all produced by Mr. Tull, however, were they not?

A. I expect that Mr. Tull got the evidence for me. I am sure I did not go out on the street and rustle it up. Somebody did it, and I expect it was Mr. Tull.

Q. You were paid for your services and employed by Mr. F. M. Tull, were you not?

A. I was employed by Mr. F. M. Tull, and my present recollection is that Mr. F. M. Tull paid me, but from what source he got the money I don't know. When I say he paid me, I would not be understood as meaning thereby whose money it was; my present recollection is that Mr. Tull gave me a check or something. I know he paid me anyhow, but don't know whose money it was he paid me with.

Recross-examination:

Q. You have explained, I believe, in your testimony, that you represented and considered yourself as representing the guardian and the minor heirs as well?

A. Yes, sir.

Q. And you were then satisfied in the conduct of these proceedings that what was being done was in their interest and for their protection?

Objected to by plaintiffs as calling for a legal opinion, and the one which it is for this court to give, as to whether it was in
206 their interest and not for a fact. Objection sustained. Defendants except.

The WITNESS: Well, there was no guardian *ad litem* appointed here was there?

Mr. NASH: I believe in one of the sales the records shows that Mr. Shaw was the guardian *ad litem*, in the second sale.

The WITNESS: I would like to see the papers in the second sale. I don't remember anything about the second sale. I don't have any recollection what was done there. I don't believe I attended to the second sale, did I, Mr. Tull, personally? I haven't the slightest recollection; I would not have remembered drawing this petition if it was not in my handwriting. I thought it strange if it had slipped out of my mind that way.

Mr. NASH: I hand you Pl'ffs' Ex. "30."

Mr. HUGHES: I am not through with my examination.

The WITNESS: I want to know what ground I stand on (referring to paper) Well, I see this. What is it you want?

Mr. NASH: You ask it for your own information, you asked it to refresh your memory.

Q. Mr. Graves, I will ask you to state whether the witnesses who were produced on these hearings were reputable and reliable witnesses?

Mr. MURRAY: We object. We have not attacked the character of this witness. It is a matter of record and is extending the inquiry further than ought to be allowed.

Objection sustained. Defendants except.

Q. Do I understand you to say, Mr. Graves, that the facts presented to you at that time were obtained entirely from Mr. Tull, or were they within your knowledge?

207 A. A great many of them were within my knowledge. I knew where the property was, I knew what the property was worth, that is approximately; I knew that Mr. Tull was building; I knew that from Judge Kinnaird about the negotiations with the loan society. I knew of Mrs. Tull's death; I knew the things were hung up in midair awaiting the getting of this money.

Q. Did you know the witnesses that were examined before the probate judge?

A. Oh, and so did he. Spokane was a small town then; everybody knew everybody else.

Mr. HUGHES: That is all.

The WITNESS: I want to say, with the permission of counsel, I don't think I had anything to do with this second proceeding, except drawing this second petition. Did I, Mr. Nash?

Mr. NASH: No, sir, I think that is where your work in the case ended, with the drafting of the petition.

The WITNESS: I have no recollection of what took place in the beginning, or anything else of this second petition. In view of some comments I have heard made by counsel here, I want to make my position there, with permission of the court, clear, state it a little more clearly. It was this, that the property belonging to both Mr. Tull and Mrs. Tull, in her lifetime, after her death and her interest going to the children, it could be made available only by putting a mortgage upon it to complete that building, either to this company or some other company. The only — that it could be done under

the law, as I held, and Mr. Kinnaird agreed with me, was by the sale of the property; the guardian could not mortgage.

(By Mr. HUGHES:)

Q. You mean a probate sale?

A. A probate sale. Mr. Tull desired that a guardian should be appointed with authority to join in the mortgage. That
208 could not be done under the law as it then stood. I don't know whether it could be done now or not. Therefore, a probate sale was ordered, at a fair price for the property. The children took a second mortgage as representing their interests, thus holding it subject to the mortgage to the German Savings and Loan Society, and Mr. Tull too- the property subject to the second mortgage. The arrangement was considered by all parties advantageous, and if it had not been for the administration of Cleveland and some things like that, some things that subsequently followed, it would have been advantageous.

Witness excused.

209 C. H. WOLF, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. MURRAY:

Q. What is your name, residence and occupation?

A. C. H. Wolf; Spokane; attorney.

Q. Where were you residing and what was your occupation in December, 1889?

A. I was a stenographer and at my office in the Goldstein building with Judge Kinnaird.

Q. In the same office as Judge Kinnaird?

A. Yes, sir.

Q. In what way were you pursuing your occupation, or profession as stenographer, by regular appointment or doing piece-work?

A. By doing piece-work for a great many of the attorneys here in town.

Q. Do you remember any work which you did for Kinnaird on the 18th day of December, 1889?

Mr. HAPPY: Before you answer that question, Mr. Wolf, I want to ask if the work was done for Mr. Kinnaird in the capacity of attorney-at-law?

The WITNESS: No.

(By Mr. HAPPY:)

Q. The work that you were asked about, whether it was done for Mr. Kinnaird in his capacity as attorney?

A. It was.

Mr. MURRAY: I think this inquiry is premature at the present time.

Mr. HAPPY: I anticipate what you are going to ask him.
The COURT: I will allow the question.
Defendants except.
Mr. HAPPY: Then we object to any testimony being given by Mr. Wolf as to any matters that he attended to in the capacity of a stenographer for Mr. Kinnaird in his capacity as attorney.
210 The objection is on the ground that the relation between the stenographer and Mr. Kinnaird was of a confidential character. He was for the time being practically Kinnaird's right hand and would not be competent to disclose anything that he was instrumental in producing, any writing in that relation, except with the consent of the client for whom the work was done; more especially ought this rule to be inforced after the death of Kinnaird himself.
Objection overruled. Defendants except.

Q. I ask you to state from your recollection whether you can remember doing any work, and what work it was on the 18th of December?
Mr. HAPPY: What year?
The WITNESS: 1889.
Q. Look at your memorandum then.
A. Refreshing my recollection from this memorandum here, I did work, and it shows what was done in a general way.
Q. Refreshing your recollection from that memorandum, state what work it was.

Mr. HAPPY: We object for the same reason that I urged before to this question.
Same ruling. Defendants except.

A. It was drawing a certificate of title to the Tull property, and writing a letter to M. W. Smith.

(By Mr. HUGHES:)

Q. Of Portland, Oregon?
A. The initials are not here; it is my recollection that it was Mr. Milton W. Smith. I know I have written a number of letters to him, dictated by Mr. Kinnaird.

By Mr. MURRAY, resumed:

Q. Did you know who Mr. Smith was?
A. No, sir; I only know him through Mr. Kinnaird writing to him; I don't know that I ever saw him.
211 Q. Do you know what his business was?
(No answer.)

Mr. MURRAY: I offer that memorandum in connection with the testimony of the witness.
Mr. HAPPY: We object for the same reason given and passed upon by the court.
Mr. MURRAY: If the stenographer will take a copy of it as he testified—oh, it is not necessary.

Mr. HAPPY: Do you offer it or not?
Mr. MURRAY: No.

Q. Now, Mr. Wolf, do you know Mr. Goldsmith?
A. I have seen the gentleman, yes, sir.
Q. This gentleman sitting here (pointing to Mr. Goldsmith)?
A. I think so, yes, sir; I don't know him.
Q. Did you know him in 1889 when you were in Kinnaird's office?
A. My recollection is that I have seen him with Mr. Kinnaird, that is all, here in the city.
Q. How many times did you see him there?
A. Oh, I could not say; that is quite a long while ago, I think there were a number of times——
Q. What was his business there, so far as you saw or hea-d, from him?

Objected to by defendants as incompetent and immaterial, and calling for hearsay testimony.

A. You ask if I know what his business was. From what I heard him say——

Mr. HUGHES: That is what I object to.
Objection overruled. Defendants except.

A. Well, I don't know as I could state what his business was from what I heard him say. My knowledge comes more from what I have heard Judge Kinnaird say.

212 Q. I don't want that. I will ask you a direct question. Was he there talking and consulting with Mr. Kinnaird?
A. Yes, sir.

Cross-examination.

By Mr. HUGHES:

Q. Judge Kinnaird is dead?
A. Yes, sir.
Q. When did he die?
A. He was on the bench in 1890.
Q. At least he has been dead some two or three years?
A. I think it was either in the fall of 1891, or the early spring or winter of 1892.

Mr. MURRAY: It was in 1894 that he died.
The WITNESS: I am not sure.

Witness excused.

213 F. M. TULL.

Cross-examination resumed.

By Mr. HAPPY:

Q. Mr. Tull, I understand you to testify that the first sale by the guardian was made necessary by reason of the fact of your wife's

death, before the first loan of $40,000 had been obtained, which you had already applied for, the mortgage company being unwilling to take your mortgage, took a mortgage executed by you alone, to secure the $40000. Is not that a fact?

A. Yes, sir.

Q. If I remember, you stated in your direct examination, that this was suggested by Mr. Kinnaird, that course?

A. Yes, sir.

Q. I will ask you if it was your understanding after your wife died that you had a right to mortgage this property, execute a mortgage by yourself alone, and without going through any probate proceedings?

Objected to by plaintiffs as irrelevant, immaterial and improper.

Mr. HAPPY: The reason for this question is, that on the direct examination plaintiffs attempt to put the responsibility of these proceedings upon Mr. Kinnaird, that they were due to a suggestion by him. Now, the point I want to develop here by this testimony is, whether Mr. Tull supposed he had a right to give a valid mortgage upon all of this property, without his having some proceeding in the probate court with reference to the supposed interest of his wife. He ought to be able to show the necessity, whether there should be any necessity for that point to be suggested by anybody.

Objection sustained. Defendants except.

Q. Mr. Tull, after the death of your wife, did you tender to the German Savings and Loan Society, a mortgage upon this property?

A. No, sir.

Q. Signed by you alone?

A. No, sir; wasn't any signed by me; I had not got to that yet.

214 Q. You had not reached the point where it was necessary to execute any mortgage.

A. I never did that; they always did that; all of the dealings I ever done with the mortgage company, I never had anything to do with the mortgage. They furnished them, and I signed them.

Q. Your application was made in May, I believe?

A. Yes, sir, I guess so.

Q. And Mrs. Tull died some time in July?

A. Yes.

Q. The latter part of July of that same year, some two months after?

A. Yes.

Q. And up to this time the loan had not been granted or passed upon, had it?

A. My opinion now is that they passed upon it.

Q. Why hadn't the mortgage been given before that then?

A. I don't know; it generally takes so much red tape to get around, so much talk after you make your application; I could not say as to that, but at any rate, it had not been executed.

Q. It had not been executed when she died, and then after her death they refused to take a mortgage executed by you alone?

A. Yes, sir; I am satisfied the loan was passed upon by Mr. Goldsmith and recommended before that time.

Q. Now, Mr. Tull, at the time that first mortgage was applied for—I mean at the time the first mortgage was given, after Mr. Tull's death, the building that you had started to erect on the corner there was incomplete?

A. Yes, sir.

Q. And you have testified to that, and it was necessary that you should have some money to finish it up?

A. Yes, sir.

Q. On the supposition that the children had an undivided half interest inherited from their mother in the property, was it not considered at that time by you and by the guardian and by the
215 attorneys who conducted the guardianship proceedings, that it would be better for the interests of the children and all parties concerned, if probate proceedings were had and the property sold, even if a second mortgage had to be given on the property sold to secure the purchase price?

A. Well, I don't know as I can answer that; the way you put the question I can't answer it.

Objected to by plaintiffs as improper and immaterial.

The COURT: Read the question.

Q. Do you understand the question?

A. Yes, but I cannot answer it as a whole.

Mr. MURRAY: The court has not ruled on the objection yet.

The COURT: The objection is overruled.

Plaintiffs except.

Q. What part can you answer?

A. The first part of it is, I would say, that we considered it the best thing to sell the property, but the after consideration had not been thought of yet, as to whether there would be a second mortgage given; in fact, I didn't know what would be done later on in regard to that; that came up afterwards. I could not say.

Q. When the matter did come up you considered that it was the best for all parties, did you?

A. I hadn't the money, and it was the only way I could do it?

Q. You hadn't the money to pay them the $14,000?

A. No, sir.

Q. And you could not get the money from the German Savings and Loan Society to complete the building without giving them a first mortgage, could you?

A. No, sir, that is right.

Q. So it was the only thing you could do, was it?

A. It was the only thing I could do at the time.

216 Q. Then it was not done for the purpose of defrauding the children?

A. It was not on my part.

Q. It was not on your part. Was it on the part of the guardian done for the purpose of defrauding the children?

Objected to. Question withdrawn.

Q. Now, in regard to the second sale that took place after the fire of August, 1889——

A. Yes.

Q. That sale was made necessary as you suppose, was it not, by reason of the fact that the fire had demolished all of the buildings that you had previously erected upon this property. Is not that the fact?

A. The fire had demolished the buildings; I did not have to have the loan at that time.

Q. You did not have the money to restore the buildings?

A. No, I did not do that.

Q. You had there a valuable piece of ground upon which there was nothing but ruins?

A. Yes, that is right.

Q. It was unproductive and subject to taxes?

A. Yes.

Q. The children had no property, had they, other than whatever interest they may have had in this real estate?

A. None whatever.

Q. You had no property or money other than——

A. I had a little money left after the fire, as I stated before, about $5,000.

Q. Yes, about $5,000 and some of the brick, the old material?

A. Yes, sir.

Q. But that was all?

A. Yes.

Q. Therefore, you considered, as I understand it, that it was necessary to realize some money to put buildings on there, in order that the property might be made productive so as to take care of itself?

A. Well, as I considered it was a good speculation, of
217 course, to do that at that time.

Q. Good business?

A. Yes, sir; I had other remedies at that time; I could have sold the land then.

Q. You could have sold the ground then, and, in view of your present looking back to that time you probably think now——

A. (Interrupting.) I think I had better sold it.

Q. You think it would have been better had it been sold?

A. Yes.

Q. But at that time, with the boom going on gloriously, it looked to you as being to the best interests of yourself and your family that you should get some money and put up buildings upon your property?

A. I thought that was the best way to make money; that was my opinion.

Q. And with that purpose in view, you made application for a second loan of $50,000?

A. Yes.

Q. And in order to get that it was again necessary to go ahead and sell the balance of the property under guardianship proceedings?

A. To get a loan on it; I presumed that was the way to go at it again, yes.

Q. And you had no purpose at that time, had you, Mr. Tull, of defrauding your children or any one else?

A. No, sir.

Q. Had you any purpose in any of these proceedings, Mr. Tull, of defrauding your children or any one else?

A. I did not.

Q. Now, Mr. Tull, at the time the first sale was made, how did you come to bid $14,000 for the property, or for the supposed interest of the children at that sale?

Mr. MURRAY: We object to that question. The record shows he did bid it, and why he did it, or how he come to do it is immaterial.

Objection overruled. Plaintiffs except.

A. I don't know as I can tell just how I happened——

218 Q. (Interrupting.) How is that?

A. I don't know as I can say just positively how I came to bid that, at this time.

Q. Do you know where Judge Houghton is, as to whether he is living or dead?

A. Oh, I suppose, that is by hearsay; I did not see him.

Q. Yes, he died away from here. You testified, I think, on direct examination, Mr. Tull, that at the time the first mortgage was satisfied no money was paid by you to the guardian?

A. That is right.

Q. Will you state what agreement was made, if you recollect, between you and the guardian at that time with respect to that $14,000 note and mortgage?

A. I could not state it.

Q. And how you came to satisfy it?

A. I don't remember just what the arrangement was.

Q. You don't remember the particulars?

A. No, sir.

Q. But, can you state that whatever was done at that time was done without any fraudulent intention, so far as you are concerned?

A. So far as I was concerned, I had no intention of defrauding anybody.

Q. After the satisfaction of the $14,000 mortgage I understand you to testify that you gave a $34,000 mortgage; that was after the second sale; and you gave a note for $34,000 to the guardian and a mortgage to secure it?

A. Yes.

Q. And that $34,000 included the amount of the first sale, $14,000, and $20,000, the amount of the second sale?

A. Yes.

Q. Now, what became of the $14,000 note when the $34,000 note was given?

A. It was taken up and made into a $34,000 note.

Q. That is, the guardian surrendered to you that note and it was cancelled?

A. Yes.

Q. And also the mortgage securing it was surrendered at that time?

A. Yes.

Q. Do you know what became of that note and mortgage?

219 A. No, sir, I do not.

Q. But it was never in the possession of the guardian after that time?

A. I could not say what was in his possession.

Q. Was it surrendered up to you?

A. That first note?

Q. Yes, sir.

A. Yes, sir.

Q. After the $34,000 mortgage was given, some time afterwards, and prior to the giving of the mortgage to the German Savings and Loan Society, a mortgage for $100,000 to secure a loan for that amount, that $34,000 mortgage was satisfied on the record by the guardian?

A. I don't know as to that. I suppose the records are the best evidence.

Q. The records show it was satisfied. Do you remember the particulars and the circumstances under which that arrangement was made between you and the guardian?

A. No, I do not, only I know that the German Savings Company or Mr. Kinnaird asked me to have that cancelled.

Q. You mean to say that they declined to loan you any additional money, except upon a clear title?

A. Yes, they demanded that that be taken off and they have the first mortgage.

Q. They demanded that their mortgage should be first?

A. Yes, sir.

Q. You were wanting to get $25,000 additional money?

A. Yes, sir, I was asking for that much.

Q. After that mortgage was satisfied, what became of it, was it delivered to you, or did the children still retain it?

A. I never had it.

Q. He had it, and kept the $34,000 note?

A. Yes, so far as I know; I never had it.

Q. You never had the note. Mr. Tull, you commenced a proceeding afterwards, did you not, in this court, against the chil-

220 dren and the guardian by complaint filed December 10, 1894. Do you remember commencing such proceeding?

Mr. MURRAY: I object as not proper cross-examination and as immaterial.

Objection sustained as not proper cross-examination. Defendants except.

Q. (Handing witness paper.) Please look at that signature, Mr. Tull, and state whose signature it is?

A. That is my signature.

The paper is here marked for identification Def'ts' Ex. "B."

Redirect examination:

Q. At the time the $34,000 mortgage was cancelled of record, was there any money paid by you to P. D. Tull?

Mr. HAPPY: We object as not redirect examination of anything brought out by the cross-examination, and further than that, it is a matter that ought to have been gone into in chief.

Objection overruled. Defendants except.

A. No, sir, no money paid.

Q. Was there ever any money paid by you to P. D. Tull, or to anybody for him, on account of that mortgage?

A. No, sir.

Mr. MURRAY: I ask permission to ask this question. It is entirely a new one, something I overlooked before.

Q. What, if any money, did your wife have and bring with her when she came here to Spokane?

Defendants object as irrelevant, immaterial and incompetent and not redirect examination of anything brought out by the cross-examination.

Mr. MURRAY: I stated that this was new matter that I had overlooked.

221 The COURT: All right; on that statement it may go in; let him answer.

Defendants except.

A. She had a little money and a farm in Missouri.

Q. About how much?

A. Two or three hundred dollars in money, and a farm in Missouri, which we sold afterwards.

Q. For how much?

A. A thousand dollars.

Mr. HUGHES: I suppose this goes in under our objection?

Mr. HAPPY: Yes, we object to it.

Q. State whether or not that money all went into this property which is in controversy, along with yours.

Objected to by defendants as irrelevant, incompetent and immaterial, and leading. No ruling.

Q. State what was done with the money then.

Defendants make the same objection. Objection overruled. Defendants except.

A. It went in with what money I had; it all went in together; I don't know where it went.

Recross-examination:

Q. You don't know where it went?
A. It went in with what money I had.
Q. You don't know, Mr. Tull, whether it was used in household expenses, in living expenses, or whether it was used in the purchase of furniture in the store, or how?
A. Well, I think it went in the general way of business; it all went in together there. I could not just say where it went. We went to housekeeping then, and of course I paid housekeeping expenses out of what money I had; it all went in together.
Q. So far as you know, it may have been used for household expenses, may it not?
A. I don't think it was, because we did not sell the prop-
222 erty until the spring before she died.
Q. You did not sell the farm until the spring before she died?
A. No.
Q. And up to that time she had but two or three hundred dollars?
A. Yes, sir.

Witness excused.

PERRY D. TULL, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. MURRAY:

Q. Your name is Perry D. Tull?
A. Yes, sir.
Q. Where do you reside and what is your business?
A. I reside in Spokane; a merchant.
Q. You are a brother of F. M. Tull?
A. Yes, sir.
Q. Are you an uncle of William L. Tull, Dora May Dormitzer and Ernest B. Tull?
A. Yes, sir, I am.
Q. Do you remember when Lucy A. Tull—did you know her in her lifetime?
A. Yes, sir.
Q. Do you remember when she died?
A. I remember about the time, yes.
Q. Do you remember soon afterwards that you made a petition to the probate court to be appointed as guardian of her children?
A. I know I was appointed, yes.
Q. Who were the attorneys who conducted that proceeding for you?
A. I don't remember. Graves, I think, was the attorney. Graves was one of the attorneys.
Q. F. H. Graves?
A. Frank H. Graves.

Q. Do you remember the firm with which he was connected at that time?

223 A. Well, no, I could not recall the firm.

Q. Who employed Mr. Graves, or his firm, to conduct that proceeding for you?

A. I don't know who employed them; I did not.

Q. You did not?

A. I did not, no, sir.

Q. Who paid him for it?

A. That I don't know.

Q. Then, of course, you did not?

A. No, sir, I did not.

Q. Now, then, about the same time and soon after you were appointed guardian, what if anything did you do or was done in your name in reference to selling real estate?

A. I believe the property was sold; that is my recollection of it.

Q. In what way was it done?

Defendants object for the reason that the record is the best evidence, and the only — it could be done, and that it has already been shown by the record.

Q. Do you remember or do you not, whether a proceeding in the probate court was had to secure a sale of a part of that property?

A. I think it was, yes, sir.

Q. When was that, with reference to the time of your appointment?

A. I think that was after the time I was appointed; just the time I don't know.

Q. Now, there was a sale under that?

A. Yes, sir.

Q. Who were the attorneys in that proceeding on your behalf?

A. I think Judge Houghton was the attorney, if I remember rightly.

Q. I am speaking of the first proceeding, Mr. Tull. It was Houghton, Graves & Jones, was it not, the firm?

A. I think that is the firm name; I know Houghton was connected with the firm.

Q. Do you remember the occasion of the sale?

A. I remember the sale being made.

224 Q. Where was the sale made?

A. On the grounds there, at the corner of Riverside and Stevens.

Q. Who was present at the sale?

A. I remember that—I don't remember any one except Judge Houghton, myself and my brother I think were present.

Q. How was the sale conducted?

A. At auction.

Q. Offered at the highest price?

A. Yes, sir.

Q. Who were the bidders?

A. F. M. Tull.

Q. What amount did he bid for the property?
A. My recollection is it was $20,000; I am not positive as to that.
Q. You remember that there were two sales, don't you, Mr. Tull?
A. I remember very distinctly the first sale. The second sale I don't remember what time, nor where it occurred.
Q. You don't remember the amount that was paid?
A. My recollection is it was $20,000; I would not be positive.

(By Mr. HAPPEY:)

Q. You are speaking of the first sale now?
A. Yes, sir.

Mr. MURRAY: I was speaking of the first sale. The witness was evidently referring to the other sale. I call attention of the court to the report which shows that it was $14,000.

Q. What were the terms of the sale as to the manner in which the price should be paid?

Objected to by defendants as incompetent, irrelevant, immaterial and not the best evidence. Objection overruled. Defendants except.

Q. In what way do you mean?
Q. How was the purchase price to be paid?
A. In a mortgage, I believe; paid in a mortgage.
Q. What was the announcement made, what were the terms announced?
225 A. Cash.
Q. Was there any cash paid to you at that time?
A. No, sir.
Q. Do you remember when that was?
A. What year?
Q. Yes.
A. No, I think it was in 1889; that is my impression.
Q. Was there ever any money paid to you at any time on account of that sale?
A. There never was, no, sir.
Q. What, if any, security, did you take for it?
A. I had a mortgage; I believe there was a mortgage given me.
Q. A mortgage given you?
A. I believe there was.
Q. Do you remember when that mortgage was given?
A. About the time, or shortly after the time a sale was made.
Q. How long after?
A. I don't have any recollection. I should judge it was very soon afterwards.
Q. Did you afterwards execute a release of that mortgage?
A. I think so.
Q. (Handing witness paper.) I show you Plaintiffs' Ex. No. "18." Is that a mortgage taken by you on the first sale?
A. Yes, sir.

Mr. HAPPY: I don't see the necessity or relevancy of this testimony. It is conceded by all parties on the record, that those mortgages were satisfied.

Q. This was taken by you at the time it bears date, was it not?
A. Yes, sir, I think it was.
Q. This is the first mortgage. Do you remember when you executed a release of it?
A. No, sir, not the date.
Q. At the time that you executed the release, was there any money paid to you on account of it?
A. There was not.
Q. Or to anybody for you that you know of?
A. No, sir.

226 Q. Did you ever receive any money on account of the purchase price paid by your brother at the time of that first sale?

Mr. HAPPY: I want to suggest this is leading, and it is their witness, and I offer that by way of objection. I make the objection to this last question as being leading, irrelevant and immaterial.

Mr. MURRAY: I think it is leading myself, I will change the form of the question.

Q. What, if any money was ever paid you by F. M. Tull, or by any one for him, upon account of the purchase price of the first sale of real estate?
A. None.

Objected to by defendants, as incompetent, irrelevant and immaterial.

The COURT: The question is answered, let it stand.

Defendants except.

Q. Do you remember the property which you sold at that time distinctly, so you can tell what it was?
A. Not the boundaries of it. I know where it was situated, on the corner of Riverside and Stevens, but the boundaries I don't know.
Q. Do you know whether or not all the property which your brother owned in that block at that time was sold at that *tone* time?
A. No, sir, not positively, I do not.
Q. Only a part of it?
A. My impression is it was only a part of it.
Q. State whether or not you afterwards made an application to the court to sell the remainder of the property, or there was a proceeding made?
A. I suppose if there was such a proceeding on record, that I did, but I have no recollection of it.
Q. You have no recollection of it?
A. No, sir.

227 Q. Do you know what attorney, or firm of attorneys, conducted that proceeding?
A. I do not, no, sir.

Q. Do you remember making a sale in another proceeding?
A. No, sir, I don't remember. I remember posting the first sale,

but the second sale I don't remember at all the circumstances attending it.

Q. You were all the time acting as guardian for those children?

A. I suppose so.

Q. You were their general guardian?

A. I suppose so.

Q. If you made a second sale, did you ever, at any time, receive any part of the purchase price in cash.

Objected to by defendants as immaterial. Objection overruled. Defendants except.

A. I know I never received any money of any kind at any time.

Q. At any time?

A. No, sir.

Q. On account of your guardianship?

A. No, sir.

Q. Did you or did you not know about the various defects in these proceedings as they were taken, what was being done?

Objected to by defendants as immaterial. Objection overruled. Defendants except.

A. I knew but very little about it.

Q. Who directed these proceedings on behalf of the children, mostly?

A. Why, F. M. Tull.

Defendants make the same objection. Objection overruled. Defendants except.

Q. In fact, Mr. Tull, what, if anything, did you do, or what if any direction did you exercise over these proceedings and over the sale of this real estate?

Objected to by defendants, as incompetent, immaterial, irrelevant and leading. Objection overruled. Defendants except.

228 A. I did not do anything, only as directed by F. M. Tull.

Q. The-, Mr. Tull, as a matter of fact, you don't remember very much about —?

A. That is right, very little about it, sir.

Q. Who besides yourself, so far as you know, and F. M. Tull, exercised any authority or direction over the matter?

Objected to by defendants as incompetent, irrelevant and immaterial, and calling for a conclusion as to what constitutes authority. Objection overruled. Defendants except.

A. No one, to my knowledge.

Q. (Handing witness paper.) Look at that paper and see what it is. Did you ever see that before?

A. It looks very much like a note that I had at one time, or a copy of it.

(By Mr. HAPPY:)

Q. A note that you had at one time?
A. Yes.

(By Mr. MURRAY, resumed:)

Q. Where is the original of that, do you know?
A. I think I have got the original, I am not certain.
Q. You think you have it?
A. Yes, sir, I think I have it; I don't know whether it is the original of that or not. I have a note here of some kind.
Q. If you have, pass it up and let me see it.
A. (Handing counsel paper.) This is the original I think.
Q. This is the original note?
A. Yes, sir, I think it is.
Q. Has that been in your possession for some time?
A. Yes, ever since.
Q. What is it, what was it given for?
A. My understanding is it was a mortgage note. That is the note, and there was a mortgage for $34,000 with the note.
Q. A mortgage for $34,000 with the note?
A. Yes, sir; that is the note.
229 Q. Do you remember executing a release of that mortgage?
A. No, I don't remember.
Q. You don't remember whether you did or not?
A. No, sir, I do not.
Q. Did you ever receive any money on that note and the mortgage covering it?

Objected to by defendants as irrelevant and immaterial. Objection overruled. Defendants except.

A. Never did, no sir.
Q. At no time?
A. At no time.
Q. If you did release it then at all, state whether or not it was for any consideration, the release was given as coming to you on behalf of the minors?
A. No consideration.
Q. Mr. Tull, what, if any, accounting did you ever make of your guardianship?
A. I never made any.

Objected to by defendants as irrelevant, incompetent and immaterial. Objection sustained.

Mr. MURR-Y: We have certified copies of the mortgage and release. I will offer this note in evidence, and ask that it be considered read.

Defendants object to the offer as irrelevant, incompetent and immaterial. Objection overruled. Defendants except.

The paper is received in evidence and marked Pl'ffs' Ex. "46." See it at page 326.

Q. Mr. Tull, what attention, if any, did you pay to any of these proceedings to sell real estate in the probate court?
A. I paid none.

Objected to by defendants as irrelevant and immaterial. Objection overruled. Defendants except.

Q. You paid none?
A. Very little, if any.
Q. Did you, at any time, ever employ or pay the attorneys who conducted it?

230 Objected to by defendants as incompetent, irrelevant and immaterial, and leading. Objection overruled. Defendants except.

A. I did not, no sir.
Q. What, if anything, did you do aside from the sale of this real estate, in the matter of the guardianship over these children?

Objected to by defendants as incompetent, irrelevant and immaterial. Objection overruled. Defendants except.

A. Nothing that I have any recollection of now.
Q. What, if anything, did you ever do in reference to the care of their person as distinguished from their property?

Defendants make the same objection. Same ruling. Defendants except.

A. Nothing.
Q. What, if any estate ever came to your hands on that account?
A. How is that?

Objected to by defendants as not the best evidence.

Q. What, if any, money or property ever came to your hands on their account?

Objected to by defendants as irrelevant and immaterial. Objection overruled. Defendants except.

A. Nothing, aside from this mortgage.

Cross-examination.

By Mr. HAPPY:

Q. Mr. Tull, you were appointed guardian of these minor children, were you not?
A. I believe I was, yes, sir.
Q. You took the oath as guardian and gave a bond, as you were required to do by the court?
A. I suppose so.
Q. Don't you know so?
231 A. Well, I must have been or I would not have been acting.
Q. Yes, you would not have been acting if you had not done that. You did do that, didn't you?

A. I think so.

Q. You understood in giving that bond you were becoming responsible for the honest conduct of your trusteeship as the guardian of these children, did you not?

A. That was a natural supposition, yes, sir.

Q. It was a natural supposition, and you understood it that way, did you not?

A. I might have probably understood it that way, although I paid very little attention to that part of it, or any part of it.

Q. Well, why didn't you pay some attention to it, you were giving a large bond, were you not?

A. Well, I was doing this as a matter of accommodation to my brother, and let him manage it as he saw fit.

Q. It was a matter of accommodation. Didn't you understand further that what was being done was to the interest of the children as well?

—. What is your question?

Q. Didn't you understand that what was being done was for the interest of the children as well as your brother?

A. Yes, sir.

Q. You did understand that?

A. Yes, sir.

Q. You had no purpose as far as you were concerned to defraud them out of any money or property?

A. No, sir.

Q. All that you did in the premises was with the honest belief that it was for the best interest of the children?

A. Yes, sir, it was. I thought it was for the best interest of the children, because my brother was directing it, and I thought he was competent to take care of his own children.

Q. Well, didn't it meet your approval, too?

A. Why, I suppose it did.

Q. So far as you could see, there was no objection to it at the time?

A. No, sir.

232 Q. You communicated frequently, didn't you, with Mr. Graves and Judge Houghton, during the progress of these proceedings?

A. Very little, sir, if any. I remember of Mr. Houghton being present at the time of the first sale, and aside from that I have no recollection of having any talks with any of the attorneys.

Q. Well, the petitions for sale were signed by you?

A. They probably were.

Q. You either read those petitions over or heard them read at the time you signed them?

A. I must have done so, yes, sir.

Q. And you knew at the time you signed them the purpose for which these petitions were being filed?

A. I probably did, yes, sir.

Q. And at the time the sales were being made of this property, you advised with Judge Houghton or Mr. Graves, didn't you, in regard to the propriety of what you were doing?

A. I have no recollection of advising with any one.
Q. Isn't it probable that you would?

Plaintiffs object to a probability. Objection sustained. Defendants except.

Q. You don't recollect about that?
A. No, sir.
Q. You do remember, however, at one sale that Judge Houghton was present?
A. Yes, I remember that he was present at one sale.
Q. You did understand that he was one of the attorneys who was representing the guardian in these proceedings?
A. Yes.
Q. You don't remember who was present at the other sale?
A. I do not. I have no recollection of the other sale at all.
Q. And you do remember that these sales were public?
A. Yes, I remember the one sale was public.
Q. At public auction?
233 A. I remember one sale was; I suppose the other was too.
Q. You know whose handwriting that note is in (Pl'ffs' Ex. "26")?
A. I do not, no, sir.
Q. Has that been in your possession ever since it was executed?
A. Yes, sir.
Q. Have you ever been removed, Mr. Tull, as guardian of these wards?
A. I don't know.
Q. Discharged in any way?
A. Not that I know of; I don't know whether I have or not. There has never been any legal service.
Q. No service upon you? no steps taken, so far as you know, to remove you from the guardianship?
A. No, sir.

(By Mr. NASH:)

Q. Do you know the signature of that note, (Pl'ffs's Ex. "46"), do you not, Mr. Tull?
A. Yes.

Mr. MURRAY: I want now to put in the index from the clerk's office of memorandum of files of case 219 probate court, that is the case which we have, for the purpose of showing the absence from the records and that nothing was ever done in the way of authorizing the discharge of these mortgages, or the investment in them, with the single exception that the first $14,000 mortgage is approved by the court; as to the rest, there is nothing on the files, and I offer the index, page 224, of memorandum of files, for the purpose of showing the absence of any proceeding or action by the court in reference to the discharge of these two mortgages, and to show the absence of any accounting or action on the part of the administrator, in fact, absence of any accounting—put it in for any purpose it shows.

Objected to by defendants as irrelevant and immaterial; for the further reason that it is incompetent as proof of any facts material to this case.

234 The COURT: I don't think this book is competent as showing the absence of a record. I think the proper way to prove the absence of a record is by a clerk.

Witness excused.

Court is here adjourned to 9 o'clock Monday morning, Sept. 19th.

235 SEPTEMBER 19, 1898—9 o'clock a. m.

Court convened pursuant to adjournment and the trial of the case proceeded as follows:

I. S. KAUFMAN, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. MURRAY:

Q. Mr. Kaufman, where do you reside?

A. Here in Spokane.

Q. How long have you resided in Spokane?

A. More than 15 years.

Q. What has been your business during the time of your residence in Spokane?

A. Real estate, principally.

Q. And during all of that time, and particularly, in 1888 and 1889, were you familiar with the values of real estate?

A. Yes, sir.

Q. Were you, in 1888, familiar with the value of the Tull real estate, at the corner of Stevens and Riverside avenue?

A. Yes, sir.

Q. What in your judgment, was the value of the corner property upon which the Tull block is now built, 100 feet on Riverside, and running back to the alley 99 and a fraction feet, in November, 1888?

Objected to by defendants as incompetent, irrelevant and immaterial under the issues in this case; and for the further reason that in this proceeding evidence cannot be introduced for the purpose of collaterally attacking the proceedings upon which the title of the parties herein is based.

Objection overruled. Defendants except.

A. It was worth at least $75,000—$750 a front foot, but I would say from seventy-five to eighty.

Q. Now, coming to 1889, just after the fire, say in December, 1889, what was the value of the remainder of that Tull prop-

236 erty, being 50 feet front on Riverside avenue, extending back to the alley fifty feet, and from there through to Stevens street, 60 feet fronting on Sprague.

Same objection. Same ruling. Defendants except.

A. I think it was worth $60,000. The Riverside frontage was worth more than Sprague, nearly twice as much.

Cross-examination.

By Mr. HUGHES:

Q. When did the market values in Spokane begin to rise rapidly?
A. I think in 1888, perhaps; oh, they began to rise before that, but there was a quiet time, probably, in 1884.
Q. Now, did that continue steadily from 1886 on, to rise?
A. Yes, they rose rapidly.
Q. They rose rapidly?
A. Yes, sir.
Q. In which years did they rise most rapidly?
A. I think perhaps in 1887.
Q. And how long did they continue to rise in value?
A. They continued to rise in value until in 1888, and perhaps in some localities in 1889.
Q. Isn't it true that values continued to rise more after the fire when the great improvements were being prosecuted here in 1889, the latter part of 1889, and in the years 1890 and 1891?
A. No, sir, the greatest rise was in 1887 and 1888.
Q. But values continued to rise, did they not?
A. No, values did not rise until after 1890, the spring of 1890; there was no rise in values.

Witness excused.

237 J. C. LODGE, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. MURRAY:

Q. Mr. Lodge, state your residence and occupation.
A. I am a resident of Spokane; occupation deputy county clerk of the superior court.
Q. Deputy county clerk. Did you, at the request of Mr. Nash and myself, examine the files of the papers in the probate case No. 219, known as the guardianship of the Tull children?
A. I did.
Q. Could you find the papers—by the way, (handing witness paper), is that a memorandum of files kept in the clerk's office?
A. It is.
Q. In the examination of the files you found the papers there noted?
A. I did, with the exception of one paper, show-cause order, that I did not find there in the jacket.
Q. You found no paper in the jacket. Did you find amongst those papers any that are not noted there, and particularly, did you find any order in the records of *of* files authorizing the guardian of these Tull infants to discharge any mortgage?

Objected to by defendants as incompetent, irrelevant and immaterial, and for the further reason that this is not the proper way to establish the absence of the record of a proceeding of the court. Objection overruled. Defendants except.

A. I did not find any such paper, any paper of that kind, except the files that are noted here, checking off the different files in the jacket and compared them with the record.

Q. You found nothing not noted there, except one order which you referred to?

A. That is all, I believe.

238 Mr. MURRAY: In connection with the testimony we now offer that page, 224, in evidence.

Mr. HUGHES: We object to the introduction of this record in evidence, for the reason it is incompetent, irrelevant and immaterial. It is not the proper method of establishing what proceedings were or were not in the case.

Mr. MURRAY: I don't know how we can establish the absence of any court proceeding, except by showing the absence of any record there.

The COURT: The objection to the page of the book is sustained. Plaintiffs except.

Witness excused.

239 DORA MAY DORMITZER, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. NASH:

Q. What is your name?

A. Dora May Dormitzer.

Q. You are one of the plaintiffs in this case, are you not?

A. Yes, sir.

Q. How old are you at this time?

A. Twenty years.

Q. When were you married, what year?

A. February, 1894.

Q. What was your husband's name?

A. Paul Dormitzer.

Q. Do you remember when you removed from the State of Kansas to this State?

A. I did not come directly to this State, went to California.

Q. Do you know what year that was?

A. Not exactly; about 1885 or '86.

Q. When these probate proceedings were commenced, were they explained to you at all?

A. Not at all.

Objected to by defendants as incompetent, irrelevant and immaterial.

The COURT: I don't think that is competent. I think the records show that she was under age at that time.
Objection sustained. Plaintiffs except.

Q. How old were you when your mother died?
A. Ten years.
Q. Do you remember what year that was?
A. 1888.
Q. When did you first learn of the facts set forth in the complaint herein, and of your rights?

Objected to by defendants as leading.

Mr. HAPPY: It assumes that she learned of the fact, and it
240 massess all the facts of that voluminous record in one question; and further the objection is, it is immaterial, irrelevant and incompetent.

Mr. HUGHES: There is no statute of limitations pleaded here. I don't see how it is immaterial.
Objection sustained. Plaintiffs except.

Q. Your brother, William L. Tull, is one of the plaintiffs in this action, is he not?
A. Yes, sir.
Q. How long has he lived in Spokane?
A. Spokane never has been his place of residence. He has always gone away to school.

Mr. HUGHES: I did not understand you.
The WITNESS: He has really never lived in Spokane. He has been away at school most of the time, and since he was about twenty he has been away all of the time; occasionally visited home.

Q. I will ask you whether or not you informed Louis Tull of the facts set forth in this complaint?

Objected to by defendants as incompetnent, immaterial, and as hearsay.
Objection sustained. Plaintiffs except.
Witness excused.

241 Mr. NASH: Mr. Happy, the last mortgage given by Tull to the German Savings and Loan Society I want. I don't suppose that you will deny that that mortgage was drawn in the office of Kinnaird & Happy, will you?
Mr. HAPPY: Show me the mortgage.
Mr. NASH: Or that it is in the handwriting of Mr. Onderdonck.
Mr. HAPPY: My impression is it was in the handwriting of Mr. Onderdonk, and that he was a clerk in our office at the time.
Mr. NASH: It is the mortgage dated the 23rd of May, 1892. You will admit that literally, will you not?
Mr. HAPPY: That is his handwriting. Plaintiffs' Ex. "44" is in the handwriting of Mr. John C. Onderdonk, who was at that time in the office of Kinnaird & Happy, the same being the mortgage for $20,000 to the German Savings and Loan Society.

Mr. NASH: Plaintiffs' Ex. "43," the acknowledgment, the handwriting and the acknowledgment are in the handwriting of Mr. Onderdonk?

Mr. HAPPY: Yes, sir. Mr. Onderdonk was the notary before whom the acknowledgment was taken. The written part of the acknowledgment is not all in Mr. Onderdonk's handwriting, I don't think, and no part of the mortgage is in the handwriting of Mr. Onderdonk, or any one who was in our office, or connected with our office. That is Pl'ffs' Ex. "43."

Mr. MURRAY: The gentlemen on the other side may have the case.

Mr. NASH: That is our case.

Plaintiffs rest.

242 *Defendants' Case.*

MILTON W. SMITH, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. HUGHES:

Q. Give your name and residence and occupation.

A. My name is Milton W. Smith; I live in Portland, Oregon; and my occupation is attorney-at-law.

Q. How long have you been engaged in the practice of law, Mr. Smith?

A. Fifteen or sixteen years.

Q. Where?

A. In Portland.

Q. In the years 1888 and 1889 were you in partnership with any person?

A. Yes—well, not the early part of 1889.

Q. What was the firm name?

A. Cox, Smith and Teal.

Q. At Portland, Oregon.

—. ——.

Q. Were you, between the spring of 1888 and the year 1893, ever designated or appointed as attorney for the German Savings and Loan Society of San Francisco, California, and if so, state what?

A. I don't remember whether it was in 1886 or 1887, some time about that time, the firm of Cox, Smith & Teal was appointed agents or attorneys of the German Savings and Loan Society to examine title, that is all.

Q. To examine or to certify title?

A. Well, to certify.

Q. Now, in any service rendered, or any employment, was it general or special in each case?

A. It was a special employment in a way outside of the—well, it probably was a special employment altogether.

Q. What I want to know is, whether you are retained and
243 paid by the German Savings and Loan Society, generally or annually, at all?

A. No, had no retainer. We were not paid anything by the German Savings and Loan Society.

Q. You were designated by them as attorneys to certify title?

A. Yes, sir.

Q. In connection with loans made?

A. In Oregon, particularly, and sometimes in Washington.

Q. Did you examine abstracts of title in respect to these several loans made by Mr. Tull in this city and which have been introduced in evidence in the course of the trial of this case?

A. Well, I examined—I did not originally examine the $40,000 loan; Mr. Cox examined and certified.

Q. Examined by a member of your firm?

A. Yes, a member of the firm, but the others I examined, except the $20,000 loan, the last one; I don't know anything about that; I did not examine that.

Q. Mr. Smith, were you, or your firm, employed by any one, and if so by whom, to make this examination, the several examinations?

Mr. MURRAY: I object to any evidence of Mr. Smith in reference to the examination of this title, and any certificate he may have made, unless he can connect either the plaintiffs or the defendant Ernest B. Tull, or some one legally authorized to act for them, as guardian or otherwise, with his examination.

Objection overruled. Plaintiffs except.

A. Well, I suppose we were employed directly by Mr. Goldsmith.

Q. What I want to know is, who brought the matter to you and who employed you?

A. Mr. Goldsmith.

Q. Mr. Goldsmith, Mr. B. Goldsmith, of Portland, Oregon?

A. Yes, sir.

Q. The gentleman who is here and has been with you gen-
244 tlemen here during the trial of this case as a witness?

A. Yes, sir.

Q. By whom were you paid for examining the several abstracts?

Objected to by plaintiffs as immaterial, irrelevant and incompetent, whether he was paid or not paid.

A. By Mr. Goldsmith.

Mr. HUGHES: I will state to the court, our purpose is to show all of these transactions, just what took place, and then it is for the court to determine what responsibilities and what knowledge are chargeable against the German Savings and Loan Society. We cannot do it in a breath. We expect to show by Mr. Smith what was done by whim, and with whom those acts were connected, and by each of the others the same facts.

Objection overruled. Plaintiffs except.

Q. Do you remember whether the abstracts were in each instance presented to you in your office or sent you by Mr.——

A. (Interrupting.) Oh, that part I could not tell; I don't remember. I suppose they were presented to me in my office, or sent to me.

Q. (Handing witness paper.) I will ask you to examine the paper I hand you, purporting to be an abstract of a portion of block 19, in the city of Spokane Falls, made by D. M. Thompson per B. N. Carrier as examiner, and at the request of one J. M. Kinnaird, and state to me whether that is the first abstract presented to your firm for examination in connection with the making of the first loan of $40,000 upon the property in question and the first mortgage of $40,000 introduced in evidence in this case.

Mr. HUGHES: Let me say, for the purpose of the record here, and assuming Mr. Smith's familiarity with what has been introduced in evidence, because he has been present during the trial of the
245 case, and for the sake of brevity——

Mr. NASH: I object to the witness answering anything that Mr. Cox, or that his firm said or did in connection with the abstract.

Mr. HUGHES: I am not asking for anything that Mr. Cox said. I asked if that was the first abstract submitted for examination. If he knows he can answer; if he does not know he will have to say he does not know.

The WITNESS: Let me see those certificates, please.

Mr. HUGHES: They were left in Mr. Happy's office, and Mr. Langford put them in the safe Saturday evening and forgot to bring them over with the other papers. He has gone after them. I will let you examine the other abstracts, in order that you may determine from an examination of all of them which is first.

A. (Examining papers.) Now, I don't recollect either about this, whether lots 4 and 5 are the corner or not.

Mr. HUGHES: 5 is the corner lot.

Q. You can tell by the date of the certificate, can't you?

A. No; these abstracts have been continued for several loans. I could only tell absolute about these by the certificates, but this contains the same matter as was presented to me in the first loan, and I think it is the same abstract, because it appears to have been certified in October, 1889. My impression is that the abstractor simply removed the earlier certificate and attached a later one; I don't exactly remember when I first certified these loans.

Q. You remember the circumstance, do you, of the application, or of the presentation of abstracts to the firm of Cox, Teal & Minor, upon a loan for $40,000 about December, 1888?

A. Cox, Smith & Teal.

Q. Cox, Smith & Teal I mean.

A. Yes.

246 Q. Do you remember the circumstances of your firm examining the title at that time and making a certificate as to the title?

A. Yes, sir.

Mr. NASH: I object to that style of examination, putting words in the mouth of the witness, and leading questions. Mr. Smith is a lawyer, and defendants would not allow us to lead.

Mr. HUGHES: If there is an objection made I will not pursue it at all. I ask it as preliminary and to expedite matters.

Q. Now, I will ask you whether the abstract upon which your certificate was made—you say when the certificate was made as to the title, the certificate was kept in your office?

A. Yes.

Q. Or was it forwarded to the German Savings and Loan Society?

A. It was kept in my office.

Q. Was that abstract ever forwarded to the German Savings and Loan Society?

A. No, in no instance has either the firm of Cox, Smith & Teal, or myself, ever sent any abstracts to the German Savings and Loan Society. We simply examined the title on the abstract and signed a certificate to the effect of the title.

Q. Do you remember the circumstance of the great fire in Spokane in August, 1889?

A. Yes, I don't remember when it was.

Q. Now, I will ask you if you recall the fact of an application by Mr. ull for a loan and the presentation of an abstract of title was made to you in reference to a loan subsequent to that for a loan from the German Savings and Loan Society?

A. Yes.

Q. You may state whether or not the abstract, which was then in your possession was requested from your firm for any purpose, and if so, for what?

A. Yes, it was handed over to Mr. Goldsmith to be continued.

Q. Do you mean extending the time shown by the abstract
247 down to the date?

A. Down to the date of the application for the loan.

Q. After being turned over was it again returned to you?

A. Yes, sir.

Q. Certified as an abstract of title down to the date?

A. Yes.

Q. You may state whether or not you made an examination of that abstract upon the making of that second loan, the one for $50,000?

A. I did.

Q. Did you make a certificate in respect of the title?

A. Yes.

Q. What was done with the abstract?

A. Retained by me.

Q. What was done with the certificate?

A. It was handed over to Mr. Goldsmith.

Q. The certificates in each case were handed over to Mr. Goldsmith to be forwarded to the German Savings and Loan Society?

A. To the German Savings and Loan Society.

Q. Now, do you remember the circumstance of an application

for a loan of $25,000 by Mr. Tull, on a portion or all of this same property?

A. Yes.

Q. Do you remember whether an abstract was presented to you on that property for examination?

A. Yes, it was.

Q. Did you make an examination of that abstract?

A. Yes.

Q. Did you make a certificate in respect of the title?

A. Yes.

Q. What was done with that certificate?

A. It was handed over to Mr. Goldsmith, the same as the others.

Q. What was done with the abstract?

A. I retained it.

Q. Do you remember the circumstance of a subsequent mortgage for $100,000, taking up the two preceding mortgages, one for $50,000 and one for $25,000 and increasing the loan by $25,000 more, making a total of $100,000?

A. Yes.

248 Q. Was there an abstract of title presented to you at that time?

A. Yes.

Q. I will ask you to state whether whenever the same property was covered by the subsequent mortgage which you have mentioned, the abstracts in your possession were requested for the purpose of extension?

A. Yes, sir.

Q. And were extended down to the date of the examination?

A. Yes.

Q. A new certificate of the abstractor put upon the abstract?

A. Yes.

Q. Now, you may state whether an abstract certified down to the date of submitting it to you was in fact submitted to you for examination in respect to this $100,000 mortgage? Did you make an examination of that abstract?

A. Yes.

Q. Did you thereupon make a certificate of the title?

A. I did.

Q. To the German Savings and Loan Society?

A. In the usual way.

Q. What was done with that certificate?

A. Handed over to Mr. Goldsmith.

Q. Now, in each of these instances, what became of the abstracts that were so presented to you?

A. I retained them in my possession.

Q. I will ask you to examine these four several abstracts of title purporting to be original and extended abstracts, and if those are the abstracts of title submitted to you for examination and upon which you based your certificates of title in the loans made by the German Savings and Loan Society to F. M. Tull, and represented by the mortgage for $40,000 referred to in the testimony of plaintiff

in this case, the mortgage for $50,000 referred to in the testimony in this case, the mortgage for $25,000 referred to in the testimony in this case, and the mortgage for $100,000, referred to in the testimony in this case?

249 A. Yes.

Q. I will ask you to state whether those abstracts, from the time they were delivered to you, or your firm, have always been in your possession, and if not, when and in whose possession were they, and to whom were they delivered, and for what purpose?

A. Well, yes, they were up to the time of the making of this $20,000 loan. Now, I am not certain whether they ever came back to me after that or not. If they did, then they were in my possession until the foreclosure of this mortgage, certainly, until the making of that $20,000 loan they were in my possession.

Q. Were those abstracts ever turned over by you, or sent to the German Savings and Loan Society at San Francisco?

A. No.

Q. Or to any officer or agent of that company?

A. They never saw any abstract on which I certified the title.

Q. In making the several examinations and certificates of title, you may state whether or not you received any employment in respect thereto, or any compensation from the German Savings and Loan Society?

A. No.

Q. Did you have any communications orally or by letter, with any of the officers of that company?

A. No, the only communication I ever had about these loans with the company was a certificate.

Mr. HUGHES: We offer these abstracts in evidence, four of them, and ask that they be marked Def'ts' Exs. "C," "D," "E" and "F" as explanitory of the testimony of this witness.

Mr. NASH: We object to the introduction of the abstracts in evidence *in evidence*, first, because they have not been shown to be correct and correspond with the originals. Second, they are immaterial and irrelevant to the issue, and tend to prove no facts in issue

250 in this action. Third, that the attempted pleas of *bona fide* purchase set forth in the answer of the German Savings and Loan Society do not state facts sufficient to constitute that defense, the defense of *bona fide* purchasers.

Mr. MURRAY: Let me make the suggestion in reference to these abstracts. So far as it appears at this time at least, there is nothing to show the court that those abstracts were abstracts from the records. There is nothing to show but what they might have been a mere imaginary document prepared by somebody off in the woods here and submitted. There is nothing to connect them with the record, and until there is some proof showing that they were actually made from the record, and from an examination of the records, it seems to me that they are not admissible.

Mr. HUGHES: If the court please, there can be of course, but one purpose for which this can be competent and material. There is

here a charge of a fraud and of actual knowledge of the defendant of that fraud. As I take it, although the testimony up to this time has roamed over a good deal of ground, which I think the court must necessarily conclude at the end of the trial of this case, has been immaterial to the actual issues in the case, certain questions may be material; that is to say, whether the defendant company had actual notice, or such notice as to put it upon inquiry, and pursuing that inquiry, would have led to actual notice of the alleged frauds in satisfying of record the two mortgages referred to in the plaintiffs' complaint. All other matters can have no bearing in this case. There is not anything in the issues, or in the pleadings that in my judgment would at all justify this court when it comes to the final examination of this case with entertaining them at all. These are ac-
251 tions for the foreclosure of a mortgage, but while the law in this case is settled, that the record in the office of the auditor is notice, and the notice which charges us and is all the notice that we are bound by, constructively, yet, if we have actual knowledge of facts which tend to show that we should have known that these mortgages were not actually paid, although purporting to be by the satisfactions entered, then we would be bound by it; then we would not be *bona fide* subsequent encumbrancers of the property entitled to priority. That, I take it, is the real question in this case, and it is important for us, in view of the testimony that has been offered in evidence in this case for the defendant, to show what were the facts in connection with this loan, in order that the court may determine whether it had actual knowledge or such knowledge as will impute actual knowledge to it of these facts. Therefore, I offer these abstracts in evidence. I shall offer in evidence later—I can't put all of the evidence in at once, of course, a contract between Mr. Tull and Mr. Goldsmith, in which Mr. Goldsmith is appointed as the agent of Mr. Tull to procure this loan, in which Mr. Tull contracts and agrees to furnish these abstracts for the purpose of examination and at his own expense, and I shall show that they were furnished by Mr. Tull. He has already testified in his examination-in-chief that he did furnish them and that he paid for them. I shall show that these were the abstracts that Mr. Tull furnished for the purpose of examination to procure this loan. And then I expect to show by the defendant company that it had no knowledge whatsoever of any of the facts other than those shown in the certificates and that the attorney had the abstract. The court must determine then what effect that has upon the
252 rights of the defendant in this case. I offer it only as bearing upon the question of knowledge or means of knowledge. Of course, I may say this, so far as the records themselves are concerned, they are not offered as proof of the record. The records speak. We do not offer them for any such purpose as that. It is immaterial whether they correctly show the record or not. That record, whatever it discloses, we are bound by. We don't need to go into an inquiry of that, but what I am trying to lay before the court is, what knowledge we had, what actual knowledge was

brought to our attention to put us upon investigation of the knowledge within our means.

The COURT: The objection to the introduction of these abstracts as testimony in the case, is sustained.

Mr. HAPPY: The court puts it on the ground that the abstracts have not been proven to have been made by competent searchers of title?

The COURT: I don't see how they are competent testimony in any view of this case. The witness now on the stand having testified that the abstracts of title were presented to him and he examined them and stated what he did with them, and who requested him to make the examination, and all about it, I don't see how it is proper or necessary to encumber the record with those abstracts of title. The presumption would be, unless there is some proof to the contrary, that these abstracts are correct abstracts of title. I suppose that would be the presumption.

Mr. HUGHES: I would like them to be identified as defendants' exhibits marked for the purpose of identification, because I shall have to refer to them in the examination of witnesses, and I think
253 that, as I have suggested, they are not competent or material for any purpose except as explanitory of the testimony of the witnesses. I wish the record to show they are offered so they may appear for that purpose.

The abstracts of title are marked for identification, Def'ts' Exs. "C," "D," "E" and "F."

Mr. NASH: I would like the record to show that a motion was made by the plaintiff and Ernest B. Tull to strike out all the testimony of the present witness as incompetent and irrelevant, and because it tends to prove no issue in the case.

Q. Mr. Smith, I will ask you to examine this paper, dated Portland, Oregon, December 19, 1888, and purporting to be signed by Cox, Smith & Teal, and to be a certificate as to the title to a portion of this Tull property, and state whose signature it is attached to that document?

A. The document and signature is that of Cox, Smith & Teal, and the handwriting thereof Mr. L. B. Cox; the whole paper, except the printed part, is also in his handwriting.

Q. State whether or not that is the first certificate of title respecting a loan for $40,000 to which you have already testified?

A. It is.

Mr. HUGHES: I offer this certificate in evidence as being a certificate made by Cox, Smith & Teal, for the German Savings and Loan Society. I think I will withdraw that offer now and offer it at a later stage of the proceedings, because its materiality is not shown. I ask that it be identified as defendants' exhibit.

The paper is here marked Def'ts' Ex. "G" for identification.

Q. (Handing witness paper.) I hand you an instrument purporting to be a certificate of title to a portion of this property in contro-

versy dated Portland, Oregon, October 21, 1889, and I ask
254 you to state whose signature is subscribed to that certificate?
A. My signature.

Q. You may state whether or not that is the certificate which you have heretofore referred to as made on the application for the $50,000 loan?

A. It is.

Q. It is the same certificate that you have heretofore referred to as one of the certificates turned over to Mr. Goldsmith?

A. It is.

Mr. HUGHES: I ask that it be identified as Defendants' Exhibit "H."

Mr. MURRAY: I don't *you*derstand you to offer that?

Mr. HUGHES: No, I don't offer it at this time.

The paper is here marked Def'ts' Ex. "H" for identification.

Q. I now hand you, Mr. Smith, a paper purporting to be a certificate of title, dated Portland, Oregon, December 30, 1889 (handing witness paper), and I ask you to state whose signature it is attached to that certificate?

A. That is my signature.

Q. You may state whether or not that is the certificate you have heretofore referred to as made upon the application for a $25,000 loan?

A. It is.

Q. And state whether it is one of the certificates referred to as made to the German Savings and Loan Society and turned over to Mr. Goldsmith?

A. It is.

Mr. HUGHES: I ask that it be identified as Def'ts' Ex. "I."

The paper is here marked Def'ts' Ex. "I" for identification.

Q. I now show you, Mr. Smith, a paper purporting to be a certificate of title to the German Savings and Loan Society, dated Portland, Oregon, May 5, 1892 (handing witness paper), and ask you to state whether it is your signature subscribed thereto?

A. It is.

Q. State whether or not that is the certificate which you have heretofore referred to as made upon the application for a loan
255 of $100,000?

A. It is.

Q. And whether it is one of the certificates which you have heretofore stated you turned over to Mr. B. Goldsmith?

A. It is.

Mr. HUGHES: I ask that this be identified as Def'ts' Ex. "J."

The paper referred to is here marked Def'ts' Ex. "J" for identification.

Q. State whether or not the certificates which you have identified are all of the certificates of title made by you in connection with

loans to F. M. Tull, of the city of Spokane, and relating to the property in controversy?

A. Yes.

Q. You may state, Mr. Smith, whether you have any other information in respect of these titles, except what is contained in these abstracts which have been identified by you?

A. I had none.

Q. State whether or not you made any examinations or investigations respecting these titles or transactions in the city of Spokane.

A. I never did.

Q. State whether or not you ever met Mr. Tull, or any of the plaintiffs in this action, prior to the institution of the suit here?

A. I don't think so.

Cross-examination.

By Mr. MURRAY:

Q. Mr. Smith, you never made any personal examination of the records of Spokane county in reference to these titles?

A. No, sir.

Q. You made the certificates which have been shown you simply from the purported abstracts which were handed to you?

A. Yes, sir.

Q. And you delivered the certificates which you made to Mr. Goldsmith?

A. Yes, sir.

Q. Mr. Goldsmith was acting ostensively on behalf of the
256 German Savings and Loan Society, was *it* not?

A. I suppose so.

Q. You suppose so. And you delivered the certificate to him as agent for the society?

A. Well, I don't know about that. I delivered it to him if he had charge of this loan. He was making the loan. Whether he was at the time agent of the society or not I don't know, in making that loan; I gave it to him.

Q. He was acting as the lender, or on behalf of the lender?

A. I don't know whether he was or not.

Q. Did you have any correspondence directly with the German Savings and Loan Society?

A. I did not.

Q. All your relations to the business then, was through Mr. Goldsmith?

A. It was.

Q. Did you understand from him that the certificates which you made were made for the benefit and information or advice of the German Savings and Loan Society?

A. Yes, sir.

Q. And was to be forwarded by him to the company or society at San Francisco?

A. Yes.

Q. I think that you said that you first became examiner or advisor in the matter which you have mentioned, some time in 1886?

A. Well, I would not want to give exact date, but it was some time along there; I don't remember without examining; I think I might tell.

Q. And your employment in that capacity continued until after the giving of this $100,000 mortgage?

A. Yes, it continues to date, I suppose.

Q. Now, was your original employment in writing or by letter?

A. Well, that I don't recollect about; I don't remember whether it was or not.

Q. You are unable to state?

257 A. No, I don't remember. It is a long time ago, and I don't know whether it was or not.

Q. You never made any examination yourself of the records of the probate court of Spokane county, did you?

A. No, sir.

Q. Do you know whether or not either Mr. Cox or Mr. Teal ever made any personal examination of these records, either probate record or the auditor's record?

A. I don't think they ever did. Mr. Teal had nothing to do with it whatsoever, never examined any title. I am sure Mr. Cox did not.

Q. I think you have already stated that you never had any correspondence directly with the company in reference to these matters?

A. No, sir, nothing only this certificate, really nothing directly with it at all in any way about it.

Witness excused.

258 BERNARD GOLDSMITH, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. HUGHES:

Q. Give your full name, your residence and your occupation.

A. My name is Bernard Goldsmith; residence Portland, Oregon, occupation, money broker.

Q. How long have you been a resident of Portland?

A. I have been a resident of Portland for 38 years, and of Oregon for 45 years.

Q. How long have you been engaged in the brokerage business in the city of Portland, Mr. Goldsmith?

A. Since 1880.

Q. Continuously down to the present time?

A. Yes, sir.

Q. Did you have any negotiations with F. M. Tull in relation to the making of a loan in the spring or summer of 1888?

A. I did.

Q. By whom was this brought to your attention?

A. This loan.

Q. Yes.

A. By H. L. Cutter.
Q. Of Spokane?
A. Of Spokane.
Q. At that time what was the position of Mr. Cutter or the business of Mr. Cutter?
A. He was cashier of the First National Bank of Spokane.
Q. How did you come to meet Mr. Tull?
A. Mr. Tull—I was here at the beginning of May, 1888. Mr. Cutter told me that one of the customers of his bank would take a loan of $–0,000 for which he was willing to pay 8 per cent. interest, with commission of $1200, and furnish the abstract. If I could place the loan, he would have me to place it and we divide the commission. I told him I would look at the property and see whether it was such a loan as I could recommend. I went and looked at the
259 property and made some inquiries as to the value and some inquiries as to the standing of Mr. Tull, went back and told Cutter I could recommend the loan.
Q. Did you meet Mr. Tull during those investigations?
A. No, not up to that time. Then Mr. Cutter said, I will get him here and introduce you to him, and we made the terms with him. So I think that afternoon I met Mr. Tull by appointment in the First National Bank building, and I was introduced to him, and we spoke about it and he said, yes, he wanted that loan, needed it and had to have it, and the terms were mentioned. He agreed to them. I drew up an application for the loan which Mr. Tull signed. I drew up a contract.

Mr. HUGHES: I don't want to encumber the record with this.

Q. (Handing witness paper.) You have seen the original of that application, and heard the copy of it referred to and offered by the plaintiffs in the course of the case?
A. Yes, sir.
Q. Was that application signed by Mr. Tull at that time?
A. It was. And I drew up a contract with the terms of commission, and so on.
Q. I will ask you whether that was signed by Mr. Tull, that contract, at the time?
A. It was.
Q. You may now examine the paper that I hand you, purporting to be a contract or agreement between yourself and Mr. Tull and state whether that is the paper referred to as drawn up by you at that time.
A. It is.
Q. You may state whether the signature F. M. Tull was signed by him and at that time in your presence.
A. It was signed by him in my presence, and Mr. Cutter's presence.

Mr. HUGHES: I now offer in evidence the paper just identified by this witness, being the same paper which was submitted to
260 Mr. F. M. Tull on cross-examination, and by him identified as the paper signed by him, being a paper which we presented

to Mr. Tull, was marked for identification Defendants' Ex. "A." I now offer it in evidence as Defendants' Ex. "A." See ex. at page 345.

The paper referred to is received in evidence as Def'ts' Ex. "A" without objection.

Q. What did you do with the application made out at that time?

A. I mailed the application with my report upon it to the German Savings and Loan Society at San Francisco.

Q. What, if anything, was done or said at the time with respect to procuring abstract of title?

A. Mr. Tull was very anxious to get a loan as soon as possible; that is, get the money as soon as possible, and as there would be some delay, in talking it over, some delay in sending his application forward, it had to go before the board of directors of the German Savings and Loan Society, they having only two meetings a week, there would be some delay, and Tull was very anxious to get the thing expedited as fast and as much as possible, and in talking it over it was suggested that they set to work and get out the abstract at once. Then it was suggested either by Cutter or Tull, I don't know which, to me, would it be satisfactory if Kinnaird would attend to getting out the abstracts. I was not much acquainted with Kinnaird, but I was satisfied that would be satisfactory and told him so, and when the bank gave me notice that they accepted the loan I instructed Mr. Cutter to go to work and get up the abstracts or have the abstracts gotten up and sent to me at Portland, Oregon.

Q. When was this loan consummated, if at all?

A. I would explain that; I would have to go into explanation. The abstract was forwarded and the mortgage prepared by
261 Smith, Cox & Teal and handed to me and I sent it up to Mr. Cutter to have it signed and put on record.

Q. Now, I will ask you to examine this abstract, which is marked for identification Def'ts' Ex. "C," and which, upon its face, purports to have been made at the request of J. H. Kinnaird, and state whether that is the abstract which was forwarded to you as you have just testified.

A. Well, I have never seen the abstract. I think I gave orders to have it forwarded to Cox, Smith & Teal. I have never seen an abstract in the whole matter.

Q. They were ordered forwarded directly to the attorneys?

A. Yes, sir. As I said, the mortgage was prepared and handed to me and I sent it to Cutter to have it signed—executed—and put on record. Between the time the mortgage left here and reached Portland Mrs. Tull had died, which, however, I did not know, but I happened to come up here a few days afterward and Cutter informed me that Mrs. Tull had died and wanted to know, if it required some court proceedings before a clear title could be established, and wanted to know if there was a delay whether the loan could finally be consummated.

Q. You say he told you it would require some court proceedings, or wanted to know, which? I did not understand you.

A. No, he said it would require some. I told him that I could say, whenever they could present a title which the firm of Smith, Cox & Teal would certify to, I thought the loan could be consummated.

Q. Was this loan ever consummated?

A. It was.

Q. Have you seen the first mortgage for $40,000 that was offered in evidence here? First, let me ask you, you have been here as a witness throughout the trial of this case?

A. I have.

Q. You remember the mortgage for $40,000?

A. Yes, sir.

262 Q. You have seen that mortgage that was introduced here in evidence. Was that the mortgage that was finally executed in pursuance of the contract and application which you have referred to?

A. It was.

Q. Who prepared that mortgage?

A. Smith, Cox & Teal.

Q. At whose instance?

A. My instance.

Q. Who paid them for it?

A. I did.

Q. You may state whether you received from Cox, Smith & Teal a certificate respecting title of the property covered by that mortgage?

A. I did.

Q. (Handing witness paper.) Examine this paper and state whether the paper I show you, marked for identification Def'ts' Ex. "G" is the certificate of title which you say you received from that firm?

A. It is.

Q. What did you do with that certificate of title?

A. The certificate of title I forwarded to the German savings bank. It needs explanation. I don't know whether it would be proper for me to give the mode and manner in which those certificates were generally forwarded.

Q. No, perhaps not generally, but what was done with respect to this certificate?

A. The loan to Tull was a building loan. That means——

Mr. MURRAY: I object to that as immaterial. The papers, the application and mortgage show that there was a loan. This is contradicting the effect of the written contract.

The COURT: Just state what was done with this particular application.

A. The loan of Mr. Tull was a building loan. He was to draw the money, a certain amount, immediately after the mortgage was

signed and delivered, and the balance in installments as the
263 building progressed. Now, in paying him over the first installment I sent to Mr. Cutter a draft on the German Savings Bank of San Francisco, payable——

Q. (Interrupting.) I don't see what that has to do with this certificate. Before you could draw any money the mortgage had to be made. Was this certificate forwarded before the society consented to make the loan or accept the mortgage or not?

A. No, this certificate of title was forwarded as soon as it was handed to me by Smith.

Q. You may state whether or not the German Savings and Loan Society finally accepted the loan or authorized any further steps in the proceeding until after the certificate was forwarded to them?

A. No.

Q. You may state whether or not you were advised after the receipt of the certificate by the German Savings and Loan Society whether to proceed or how did you proceed after that time?

A. After they received the certificate?

Q. After receiving the certificate.

A. After they received the certificate I could draw in favor of Tull on them for the first payment which he was to get on the loan.

Q. When the mortgage was first made and recorded however?

A. Yes, sir.

Q. Now, I will ask you to state who paid for the examination of the abstract and the certificate of title and the making of the mortgage?

A. I did.

Q. Out of your commission of $1200 in pursuance of that contract?

A. Yes, sir.

Objected to by plaintiffs as immaterial.

Mr. HUGHES: I think it is material to show whether he paid it
264 for himself or paid it for the German Savings and Loan Society, show the fact. The court will bear in mind that this agreement on his part is for $1200 to render services in procuring the loan, and for services in examining the property and examining the title, in making out the necessary papers and documents, Tull to furnish the abstract.

Objection overruled. Plaintiffs except.

Q. (Question read.)

A. Yes, sir.

Q. And I asked you the further question if it was paid out of your commission, and then the further question if it was paid in pursuance of this contract.

A. Yes, sir.

Q. Do you remember the circumstance of the great fire in Spokane, about the 4th of August, 1889?

A. I do.

Q. Do you remember in respect to the buildings that had been

erected upon this Tull property under this building loan, whether they were burned or not?

A. They were.

Q. Now, you may state as briefly as you can whether a new application was made for the loan to rebuild upon this property?

A. It was.

Q. That application finally was for how much?

A. $50,000, I think $50,000.

Q. It was finally for $50,000?

A. I think it was first $40,000 and that afterwards raised to $50,000.

Q. You saw the application plaintiffs introduced in evidence for that loan here, did you, at the trial?

A. I heard it read.

Q. What did you do with that application?

A. I forwarded it to the bank.

Q. State whether or not Mr. Tull furnished the abstracts of title to that property again?

A. Yes, sir.

Q. What did you do with them, or what was done with them?

265 A. The abstracts of title?

Q. Yes, or what direction did you give in respect to them?

A. They were sent to Smith, I think, of the firm of Cox, Smith & Teal, at both times, if I am not mistaken. Anyway they were sent to the same firm to be examined.

Q. Did you get a certificate of title from Mr. Smith in respect to this loan?

A. Yes, sir.

Q. (Handing witness paper.) I will ask you to examine this paper which has been marked for identification Def'ts' Ex. "H" and state whether that is the certificate of title for this $50,000 loan received by you from Mr. Smith?

A. It is.

Q. What did you do with it?

A. I forwarded it to the bank.

Q. Thereafter you may state whether or not that loan was consummated?

A. It was.

Q. Who prepared that mortgage?

A. Mr. Smith.

Q. Who paid Mr. Smith for the certificate and the preparation of the papers?

A. I did.

Q. You may state whether it was paid on account of yourself as broker and out of your brokerage contract, or what account you paid it out of.

Mr. MURRAY: There does not appear to have been any contract with Mr. Tull. That contract only applied to the first $40,000 loan. Question withdrawn.

Q. You may state whether or not this paper was made in pursuance of any brokerage agreement between you and Mr. Tull respecting this loan. I will come to that brokerage agreement then immediately.

A. That the payment was made?

Q. This payment to Mr. Smith.

A. Yes.

266 Q. Now, my attention has been called by the opposing counsel to the question whether there was an agreement between you and Mr. Tull, a brokerage agreement between you and Mr. Tull with respect to this $50,000 loan. You may state, Mr. Goldsmith, what are the facts in respect thereto, and whether any such agreement was made, and if so, when it was and when made.

Mr. LEWIS: We object to his stating when it was. The application already shows it was made.

Q. If oral what it was and if in writing so state.

A. How is that?

Q. You may state when that agreement was made and whether or not it was in writing, and if it was not in writing, state what the agreement was.

A. Well, I am not sure now whether it was oral or in writing, but there was an agreement made on the same basis as the first one.

Q. Did you see Mr. Tull here in Spokane after the fire?

A. Yes, I did.

Q. You may state whether at that time your agreement was made with him?

A. I think so.

Q. Was Mr. Cutter there also?

A. Yes, sir.

Q. Now, I have asked you to get any contracts you have and you have not produced it to me, any written contract. I will ask you to state what is your best recollection as to whether there was a contract in writing made at that time, a new contract or——

A. (Interrupting.) There was a new contract made; whether in writing or just orally I could not——

Q. (Interrupting.) Have you found it among your papers? Have you looked for your contract?

A. No, I have not found the contract among my papers.

Q. You may state whether it was an independent contract or an extension of the old one?

267 A. Oh, it was altogether an independent contract. I charged him a commission again, not so much as the first time; I think the commission was $500 the second time, on the same proposition, he to furnish the abstract and I to pay the attorneys' fees for examining the title.

Q. Mr. Goldsmith, do you remember the circumstance of an application being made for an additional loan of $25,000?

A. I do.

Q. Were you here at that time?
A. No.
Q. Was that application sent you by Mr. Tull?
A. The application for a loan?
Q. Yes, sir.
A. Have you got that application here?
Q. It has been introduced in evidence here.
A. Where is it dated? Dated in Spokane or Portland?
Q. I think this is partly in the handwriting of Mr. Tull, the third application. I see this application explains itself. The original application introduced by plaintiffs is accompanied by a letter from Mr. Tull to you. After seeing it perhaps you can answer my question, whether you were here or whether the application was sent you by Mr. Tull.
A. It was sent to me.
Q. Now, what was done in pursuance to that application?
A. I think I wrote him a letter giving him my terms for a commission. In pursuance of that letter I forwarded to the bank with my endorsement on it.
Q. You state whether you made any arrangements with him for a commission again?
A. I did.
Q. You may state whether or not a certificate was procured as to the title and from whom.
A. A certificate was procured from Mr. Smith.
Q. I will ask you to examine the certificate I now hand you marked for identification Def'ts' Ex. "I," and say whether
268 that is the certificate obtained from Mr. Smith in pursuance of this application for the $25,000?
A. It is.
Q. You may state whether in like manner the $100,000 loan was made.
A. It was.
Q. You may state whether you received a certificate of title from Mr. Smith respecting that loan?
A. I did.
Q. Examine this paper marked Def'ts' Ex. "J" for identification, and state whether that is the certificate of title.
A. It is.
Q. You may state who procured the papers to be made as the mortgage for the last two loans I have mentioned?
A. I did
Q. Who paid for them?
A. I did.
Q. What connection, if any, did Mr. Cutter have with these loans?
A. Mr. Cutter having introduced me first to Mr. Tull, brought the matter to my notice and demanded one-half of the commission received after the attorneys' expenses for examining title.
Q. You say "demanded" it?
A. Yes, when the first loan was spoken of and I agreed to it and that followed through all of these series of loans, same thing.

Q. And he received a part of the commission on each of these loans?

A. He received one-half of the commission after the attorneys' were paid, after the attorney's fees of Mr. Smith was paid out of it.

Q. Did you, in this connection, employ or pay Mr. Kinnaird in any way?

A. I neither employed him nor paid him.

Cross-examination.

By Mr. MURRAY:

Q. Mr. Goldsmith, how long have you been acting for the German Savings and Loan Society?

Mr. HUGHES: We object to that as assuming something not
269 in evidence. It is not shown here that he has ever been acting for the German Savings and Loan Society, and it is expressly shown that he acted for the borrower.

Objection sustained. Plaintiffs except.

Q. How long have you been acting as broker and negotiating loans between the German Savings and Loan Society and their customers?

A. Ever since the early part of 1887.

Q. 1887? This first Tull loan, then, was one among the first that you had procured?

A. This Tull loan?

Q. Yes.

A. Amongst the first; either the first or second in Spokane.

Q. Had you a contract with the German Savings and Loan Society?

A. No, sir.

Q. Never had any contract with them?

A. No.

Q. Then when you received an application for a loan the society knew nothing of it until they received the application sent through you?

A. Correct.

Q. You had in your possession, at the time, did you not, blanks prepared and furnished you by the society, upon which to make those applications?

A. No, sir; I got those blanks up myself.

Q. What?

A. I got them up and had them printed myself.

Q. You had those printed yourself?

A. I did, at Portland, Oregon.

Q. When you forwarded these applications you wrote a report of them as surveyor, didn't you?

A. I did.

Q. Who appointed you surveyor?

A. Well, I consented to the loan—I had to either recommend it or not.

Q. Oh, very well, but who appointed you surveyor?

A. Nobody appointed me surveyor.

270 Q. Oh, that was voluntary on your part?

A. It was part of the broker's business to present to the company the loan if he endorsed it in the proper light.

Q. And you did that in all the loans which you made?

A. In all the loans that I made.

Q. Both these Tull loans and others?

A. Yes, sir.

Q. At whose request did you make a survey?

A. At whose request?

Q. Yes.

A. At no one's request. The applicant's request and my knowledge that in presenting the loan I would have to make some remarks about it, whether I would recommend them or not, or whether I thought them safe or not. If you read my report it will show that it is in shape of a recommendation that the loan should be accepted.

Q. Was that the understanding between you and the company that your recommendation would be considered good?

A. No.

Q. You had no such understanding as that?

A. Well, I supposed that my recommendation would carry certain weight with it.

Q. What reason had you to suppose that your recommendation would be of weight?

A. Because a great many of the loans that I recommended they accepted. A good many of them they declined.

Q. They had been in the habit of accepting your recommendation, then?

A. If it coincided with their views they did.

Q. What means had they of knowing—by the way, I see, in looking at your report it is entitled "Surveyor's report." That was a report?

A. Yes, sir, that was copied from some English company's applications.

Q. I see that in all the reports which you have made, and which have been introduced in evidence that you report as to the situation, condition and value of the prpoerty?

A. Yes, sir.

Q. Those were considerations which the company took into
271 account in determining whether they would make a loan or not, were they?

A. Yes, sir.

Q. What means other than your report had the company as to knowing the truthfulness of these facts?

A. Of these facts?

Q. Which you reported?

A. I suppose they had judgment about my character, whether I would tell the truth or whether I would not.

Q. Oh, then, as a matter of fact, they did rely upon your character, and upon your judgment somewhat, didn't they?

A. Yes, I suppose so. I flatter myself they did.

Q. In that respect then, you were a sort of an agent of the company as well as F. M. Tull, were you not?

Objected to by defendants as not proper cross-examination and as argumentative. Objection sustained.

Mr. MURRAY: I think that is argumentative, perhaps.

Q. This is the first application, May 8, 1888, and this is the first application for a loan on city real estate. This is not your brokerage contract, but it is the application?

A. Yes, sir, it is the application.

Q. You say here, "The owner is now expending and will expend on the building $20,000 before he will require any money from us." Whom did you mean by "us"?

A. Well, of course, it had reference to the German savings bank; I know my money did not go into it.

Q. Oh, you meant the bank, then?

A. Yes, the bank.

Q. And using the word "us" you must have considered yourself as a part of the bank, didn't you?

A. I may have, a part of it, but unfortunately I was not.

Q. But you considered yourself as interested the same as the bank in this loan?

272 A. Yes, I considered myself interested as far as my commission went, which was primarily an interest for procuring for the bank a good and safe loan.

Q. You were then really acting on behalf of the bank, too, were you not? That is what I want to get at.

A. Well, I was acting on behalf of the bank in so far that unless the bank accepted the loan it would not be made, I would not get no commission out of it.

Q. (Handing witness paper.) That report is in your handwriting is it not?

A. That is in my own handwriting.

Mr. MURRAY: You have not put any of these in evidence yet, and I want to ask the witness a question in regard to them.

Q. Now, Mr. Goldsmith, you received the abstracts as they were prepared. They were delivered to you?

A. No, they were not.

Q. They were not delivered to you? To whom were they delivered?

A. They were sent to Mr. Smith.

Q. Didn't you deliver some of them to Mr. Smith yourself?

A. I don't think I ever did.

Q. So you had no connection with the abstracts, then?

A. Sir?

Q. You had no personal connection with the abstracts?

A. No.

Q. And Mr. Smith, or his firm, prepared the certificates, which have been referred to?

A. Yes, sir.

Q. And delivered the certificates to you, and you forwarded them to the home office in San Francisco?

A. Yes, sir.

Q. Did you have an understanding with the officers of the company at San Francisco that their business would be done in that way?

A. I had an understanding with the bank that the only money after loans were accepted and papers executed, the money would be paid out only after the receipt of a certificate of title from the firm of Cox, Teal and Smith, and afterwards Milton W. Smith.

Q. At whose request were these abstracts of title submitted
273 and a certificate of title made by, Cox, Smith & Teal?

A. Repeat that question.

Q. At whose request was the certificate of title made by Cox, Smith & Teal delivered to you?

A. At my request.

Q. Why did you request them to make it? Why didn't you go to somebody else?

A. Well, Smith, Cox & Teal were the lawyers designated.

Q. By whom?

A. By the bank in certifying the title.

Q. What bank?

A. The German Savings and Loan Society.

Q. They informed you that Cox, Smith & Teal——

A. (Interrupting.) Yes, sir, and afterwards Milton W. Smith.

Q. Now, when these loans were made, how do you say the money was forwarded?

A. How soon?

Q. How was it forwarded?

A. It was generally forwarded by a draft on the German savings bank in favor of Tull and that draft I generally sent to Mr. Cutter to deliver to Mr. Tull. Some drafts I sent direct to him.

Q. You drew the drafts yourself?

A. Yes, sir.

Q. Have you any of those drafts?

A. No, I have not got them.

Q. Mr. Cutter, then, was the—or the First national bank, of which Mr. Cutter was cashier, was the agent for paying over this money to Mr. Tull, was he not?

A. No, but some of the drafts were sent to Mr. Cutter in favor of Mr. Tull on the German savings bank, to hand to Mr. Tull.

Q. Now, one moment about that agreement between you and Tull, whereby you were to get $1200 commission. You and Mr. Cutter were to divide that, were you not?

A. Yes, sir, after Mr. Smith got pay for his services.

Q. Oh, you had to pay Mr. Smith?

A. Yes, sir.

274 Q. And how came you to enter into that agreement with Mr. Cutter?

A. Well, it was Cutter's business; he brought it to me; that is

often done with brokers, divide commissions with the man who got the business that way.

Q. You and Cutter were partners in the transaction, were you not?

A. Yes, sir.

Q. For the purpose of getting a commission?

A. Yes, sir.

Q. Where is Mr. Cutter now?

A. Where the woodbine twineth.

Q. You never made any other written brokerage agreement, except the one that has been read here, did you?

A. No, I don't think so.

Q. Anything else? You just went along and there was never any specific agreement after that, was there?

A. Oh, yes, always.

Q. Always?

A. Always.

Q. Now, when you got that $50,000 loan, how much of a commission did you and Cutter then get?

A. I think $500.

Q. $500?

A. Yes, sir.

Q. And the $25,000, how much commission did you get then?

A. I think $250.

Q. $250. You graded them down a little?

A. Yes, sir.

Q. Who paid for getting these abstracts?

A. Mr. Tull.

Q. You did not pay for them?

A. No, sir.

Q. Who paid for drafting the mortgages?

A. I paid Smith's part of it.

Q. I asked you who paid for drafting the mortgages?

A. I paid for it.

Q. You paid for it. I understand that all of these mortgages were prepared by you, or by Mr. Smith for you, and sent to Mr. Kinnaird here to be executed?

A. That I don't know, whether they were sent to Kinnaird or not; I don't know anything about that.

Q. You asked Cox, Smith & Teal to make them, did you not?

A. I did.

275 Q. And paid for them?

A. I did.

Q. And they saw to having them prepared and executed and brought back and delivered to you, is that correct?

A. I think so.

Q. To whom were the mortgages delivered by Smith, or Cox, Smith & Teal?

Mr. HUGHES: For the purpose of execution?

Mr. MURRAY: No, after their execution.

A. After their execution? After their execution they were delivered to me.

Q. They were delivered to you by whom?

A. I think by Cox, Teal & Smith.

Mr. HUGHES: He understand- by execution, the making of them out, the drafting of them.

Q. Mr. Hughes suggests that perhaps you don't quite understand me. I asked you to whom were the mortgages *were* delivered after they were signed and acknowledged by Mr. Tull.

A. Oh, I suppose they were delivered to Cutter to put on record. I knew they were delivered to be recorded.

Q. That would be the first thing, of course?

A. Yes.

Q. And when they came from the record, if you know, to whom were they delivered?

A. They were delivered to me.

Q. To you?

A. Yes, sir.

Q. And what did you do with them?

A. I forwarded them to the bank.

Q. To the bank? And all of that was done before any money came?

A. No, in some instances we usually record the mortgages as you well know, you have to leave them in the custody of the clerk and we usually—I usually take, where the mortgages were left, a certificate from the clerk that such and such mortgage was left for
276 record, with the seal to it, and in some instance- that certificate was forwarded to the bank and the money was paid out that way before the mortgages were really delivered.

Q. And when the clerk's certificate of mortgage had been filed for record the bank would pay the money?

A. Yes.

Redirect examination:

Q. Mr. Goldsmith, I recall having asked you with respect to the first and I think the second mortgage, but I don't remember whether I asked you, with regard to the subsequent mortgages, whether you ever employed Mr. J. H. Kinnaird to render any service in respect to the examination of title or giving an opinion. You may state now whether you did or not.

A. Whether I did or not?

Q. Yes, sir.

A. I did not.

Q. State whether or not you ever paid Mr. Kinnaird for any service rendered?

A. I never did.

Witness excused.

277 GEORGE T. TOURNY, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. HUGHES:

Mr. HUGHES: To save any question as to how the record stands, it may be admitted of record now that the allegations of the defendant in its answer in respect to its corporate capacity and its compliance with the law to do business in the State are true.

Mr. MURRAY: It is admitted by the replies, but you can have it in the record if you want to.

Q. Give your full name, residence and occupation, Mr. Tourny.

A. My name is George Tourny, residence, San Francisco, California; occupation, secretary of the German Savings and Loan Society, San Francisco, California.

Q. How long have you been secretary of the defendant The German Savings and Loan Society, of San Francisco, California?

A. Over ten years.

Q. What are your duties as secretary in relation to the making of mortgage loans, as to what part of the transaction you supervise and attend to?

A. I believe I, to a great extent, supervise the business, generally, of the bank.

Q. Including the making of mortgage loans?

A. Including the making of loans, subject, of course, to the approval of the board of directors.

Q. Do the board of directors pass upon each loan, each application?

A. Yes, sir.

Q. Mr. Tourny, do you recollect the circumstances of receiving the first application, some time in the spring or summer of 1888, of F. M. Tull, of Spokane, defendant in this case, for a loan upon his
278 property which property has been designated in the course of the pleadings and trial of this case as the Tull block?

A. I do.

Q. From whom was that application received?

A. Mr. Goldsmith, of Portland.

Q. Who was Mr. Goldsmith, and what relation, if any, did he bear to your company at that time?

A. At that time Mr. Goldsmith was the statutory agent of Oregon.

Q. What do you mean by statutory agent?

A. I mean the party there clothed with authority to accept service.

Q. Service of judicial process?

A. Yes, sir.

Q. In pursuance of the statutory requirements of the State of Oregon?

A. Yes, sir.

Q. What other relation, if any, existed between your company and Mr. Goldsmith at that time?

A. What is the question?

Q. What other relation existed between Mr. Goldsmith and your company at that time, did you deal with him at all, if so, how?

A. We dealt with Mr. Goldsmith as a broker as we would deal with other brokers.

Q. Was Mr. Goldsmith appointed by the bank as its agent in respect to the negotiation of loans at that time, or during the period of these loans?

Mr. MURRAY: I object as leading. Let him tell what the relation was, and if there was any appointment I submit it should be——

Question withdrawn.

Q. Mr. Tourny, you may state if any, what authority or appointment or agency was created in Mr. Goldsmith by your bank during that time, say 1888 and 1889, up to 1892, other than you have already mentioned as statutory agent in the State of Oregon?

A. None.

279 Q. Did you ever know anything of Mr. Horace L. Cutter of Spokane, in connection with these Tull loans?

A. I had not heard of Mr. Cutter in connection with those loans until the interrogatories were sent to the bank. That is the first knowledge I had of Mr. Cutter ever having anything to do with these loans.

Q. You mean the interrogatories propounded in this case and read in evidence here?

A. Yes, sir, signed by me.

Q. I will ask you to state whether your company had any negotiations or any dealings with Mr. Cutter during those years, and if so, what, in a general way, or subsequent to this first loan?

A. I think I would not be positive whether during that period, but we have had communications from Mr. Cutter applying for loans as we received from other people, from others here as brokers, as we have received from others here in Spokane. I recall one loan particularly that I have in mind that was made here in Spokane, where Mr. Cutter sent the application to us.

Q. As a broker?

A. As a broker.

Q. But what I want to get at particularly is whether he ever wrote you in respect to any of these loans?

A. No, sir.

Q. Not whether you had any communication with him?

A. We had no communication with him, nor did he write us.

Q. Personally or by correspondence?

A. Personally or by correspondence, nor did I know that Mr. Cutter had anything to do with the Tull loans, until those interrogatories were received, those interrogatories are in evidence here.

Q. Now, after this application was made, this first application, did you ever have any correspondence with Mr. J. M. Kinnaird in respect to the rendering of any services in your behalf, relative to the application of this first loan?

A. No, sir.

280 Q. Did your bank ever employ or authorize the employment of Mr. Kinnaird for the purpose of rendering any service respecting this loan in its behalf?

A. No, sir.

Q. Or for any one else?

A. My first knowledge as to Mr. Kinnaird's connection with these loans I received through the interrogatories. That is the first knowledge that I had of Mr. Kinnaird.

Q. It will save me the necessity of asking you the question in regard to each of the succeeding loans. You may state now generally, whether you ever employed Mr. Kinnaird or paid Mr. Kinnaird?

A. No, sir.

Q. To render any service respecting any of these loans?

A. No, sir.

Q. Mr. J. M. Kinnaird?

A. Which loans have you referred to?

Q. I have reference to the loans that I have referred to in my examination which are the $40,000 loan, the $50,000 loan and the $25,000 *or* mortgage, and the $100,000 mortgage.

A. No, sir.

Mr. HUGHES: I will come to the $20,000 one later on.

Q. You may state what relation, if any, existed between your bank in the year 1888 and the law firm of Cox, Smith & Teal, of Portland, Oregon.

A. Cox, Smith & Teal were attorneys, were designated by the bank as attorneys whose certificate of title we would accept and loan upon, and in reference I will say to any Spokane loans, if a certificate had been presented to us by Struve & McMicken at the time, the same course would have been pursued. Struve & McMicken of Seattle; we would have loaned upon their certificate and for no other purpose.

Q. Now, I will ask you if Cox, Smith & Teal had been designated as attorneys whose certificates would be taken in applications for loans?

A. Yes, sir.

Q. What attorneys, if any, in 1888 and 1889 had been designated in the State of Washington as attorneys whose certificates re-

281 specting titles would be accepted as a basis for a loan?

A. Struve & McMicken of Seattle.

Q. Any other attorneys in the State of Washington?

A. No, sir.

Q. Had J. M. Kinnaird, at any time between the years 1888 and 1892, inclusive, been designated as an attorney whose certificate of title would be accepted by your company as a basis for a loan?

A. No, he had not.

Q. Had J. M. Kinnaird ever, in any other way, been appointed, employed or authorized to represent the German Savings and Loan Society in these years?

A. No, sir.

Q. Did you ever have any correspondence with J. M. Kinnaird in respect to any of these four mortgages that I have mentioned?
A. No, sir.
Q. Did the bank that you represent ever have?
A. No, sir; no correspondence of any kind. In fact, as I have said, I had no knowledge, nor any one of the bank, as to Mr. Kinnaird figuring at all in this Tull matter, until these interrogatories were received. That was my first information on the subject.

Court is here adjourned to 2 o'clock this afternoon, at which time the examination of the witness GEORGE T. TOURNY, proceeded as follows:

Q. You have been present as a witness on behalf of the defense during this entire trial, have you?
A. Yes, sir.
Q. You heard the first application made by Mr. Tull for the $40,000 loan, introduced and read in evidence?
A. Yes, sir.
Q. Was that application sent to your bank?
A. Yes, sir.
Q. And produced here at the trial by you?
A. Yes, sir.
Q. Mr. Tourny, from whom was the application received, that is, who forwarded it to you?
A. Mr. B. Goldsmith of Portland.
282 Q. What was the evidence of title upon which you made that loan, furnished, I mean, to your bank?
A. A certificate of title, from——
Q. (Interrupting.) Examine this paper (handing paper to witness) marked for identification Def'ts' Ex. "G," purporting to be signed by Cox, Smith & Teal, and state whether that is the certificate you refer to.
A. This is the certificate I refer to.
Q. Was there any other evidence of title submitted to your bank?
A. No, sir.
Q. Did the bank make this loan upon the information received respecting the title, except that covered in this certificate?
A. No, sir.
Q. Did your bank, at any time, ever have any other information in making that loan respecting this title, than that conveyed in this certificate?
A. No, sir.

Mr. HUGHES: I offer this certificate in evidence as Def'ts' Ex. "G."
Mr. MURRAY: I wish to object to that upon the ground that upon its face it purports to be an opinion of Cox, Smith & Teal, attorneys passing the title, which F. M. Tull, the mortgagor had, purports to have been made for the defendant The German Savings and Loan Society at their request, and further, expressly restricts the liability of the parties making it to their liability to the German Savings and Loan Society, showing it was simply an instrument or an opin-

ion given by an agent of the bank to the bank, and there is no evidence in the case whatsoever showing, or tending to connect F. M. Tull with it, except as it recites it is in pursuance of an application of F. M. Tull for a loan; nothing whatever to show that the plaintiffs in this action were in anywise connected with it, or that Ernest B. Tull, the infant whom I represent, was in any way con-
283 nected with it, or any guardian, or the person legally authorized to represent them. In fact, it is simply a communication between this corporation and its own employed and authorized attorneys. It is entirely irrelevant, immaterial and incompetent and is a self-serving declaration.

The COURT (after argument of counsel): The objection to this certificate is sustained. Defendants except.

Q. What actual knowledge or information did you have, did the bank have, with respect to the title, upon which this loan for $40,000 was made, the first mortgage?

A. A certificate of title.

Q. Which I showed you?

A. Which you showed me, was the only information we had.

Q. Did your bank ever have any knowledge or information concerning the institution of probate proceedings of any kind?

A. No, sir.

Q. Or in respect to making the guardians' deed to Mr. Tull?

A. No, sir.

Q. You have stated the loan was made upon the application to the court, and accompanying the application was the certificate of Cox, Teal & Smith which was shown you, and excluded by the court from the evidence. Now, you may state whether this loan was made contrary to or in accordance with your regular and uniform custom in all loans made outside of San Francisco.

A. It was.

Mr. MURRAY: I object to that. It makes no difference what their custom was.

Mr. HUGHES: I would not have thought it necessary to go to the extreme, but the court indicated at the outset, and in the course of its ruling, adopted that course which I have always assumed to be the correct course, and which I think is adopted by most of
284 the judges of this State, because of the fact that an equitable cause is tried *de novo*, theoretically at least, in the supreme court; practically it can scarcely be said to be so; and that being true the court will allow a party in equity, at least a plaintiff in equity, great latitude in the introduction of its proofs. Now, the difficulty about the defendant is, that while it does not have to negative anything but positive acts tending to establish fraud, it is impossible for us to know what the appellate court might consider as evidence. That is why I thought best to take the precaution to offer this evidence which would explain all our actions with regard to this transaction.

The COURT: It is true I allow the plaintiff in an equity cause considerable latitude in the introduction of testimony, and I ought

to allow the defendant an equal latitude; that is to say, I will allow the defendant to meet all the evidence introduced by the plaintiff. I think this is going outside of that rule. The objection is sustained.

Defendants except.

Q. In making this loan, this first loan of $40,000, was any one, was Mr. Goldsmith, or Mr. M. W. Smith, or the firm of Cox, Smith & Teal, or Mr. J. M. Kinnaird, or Mr. Cutter of this city, employed and paid for representing the company in any manner whatsoever?

A. No, sir.

Q. I mean employed or paid by the German Savings and Loan Society.

A. No, sir.

Q. Mr. Tourny, you say the original application introduced in evidence by the plaintiff for the $50,000 loan, did you?

A. Yes, sir.

Q. That was produced here by you?

A. Yes, sir.

Q. When and from whom was that received?

A. Mr. Goldsmith of Portland.

Q. When, with reference to its date, that is what I am try-
285 ing to get at. I don't call upon you to state the precise date it was received.

A. I don't know the exact date.

Q. But whether in the ordinary course of business, soon after the application.

A. Soon after the application was dated, I suppose.

Q. What action was taken by your bank upon that application and the report?

Mr. MURRAY: I object as immaterial and improper. The fact that they made a loan and took a mortgage is sufficient answer to that, and it is already in. I object to their proving anything outside of the record that we are not connected with.

Question withdrawn.

Q. You may state whether or not upon that application and the report that accompanied it, you made the loan, or whether the loan was not made until after the receipt of a certificate respecting the title by Milton W. Smith, similar to the one previously presented to you?

Mr. MURRAY: I object to that. The mortgage shows that the loan was made; upon what certificate, what evidence, what reports that *were* made is immaterial, unless there *was* some representations of something eminating from these three children or somebody legally authorized to represent them, and speak for them.

Objection sustained. Defendants except.

Q. Mr. Tourny, in making the loan upon this $50,000 mortgage, did your bank ever have any knowledge or information in respect to the title of the property upon which the loan was made, and if so what?

Mr. MURRAY: I object to that upon the ground before stated, and upon the grounds upon which the entire case turns, that this mortgage company is chargeable with everything, and every kind of notice that appears upon public record, whether they had actual notice or not.

286 The COURT: I don't think this is competent, Mr. Hughes. If you want to be heard I will hear you.

Mr. HUGHES: I think it falls in the same line. I am taking the precaution to ask this question for the sake of the record in respect to this. The purpose will be to show that he had no knowledge.

Same ruling. Defendants except.

Q. Mr. Tourny, did you have any information or knowledge in respect to any probate proceedings respecting the title at the time of making this $50,000 loan, your bank, I mean?

A. None, whatever.

Same objection. Same ruling. Defendants except.

Q. Any of the officers of your bank?

A. None whatever.

Same objection. Same ruling. Defendants except.

Q. Did you authorize or employ J. M. Kinnaird, or any other person, to attend to the conduct of probate proceedings respecting the interests of these plaintiffs, or of the defendant Ernest B. Tull?

A. No.

Q. Or respecting in any way the title to the property covered by this mortgage?

A. No, sir.

Q. Or any of these mortgages?

A. No, sir.

Q. Was J. M. Kinnaird employed by the defendant savings bank in any capacity whatever respecting the making of this $50,000 loan?

A. No, sir.

Q. Was Mr. Goldsmith employed or paid by you for any service connected with the making of this loan?

A. No, sir.

Q. Or Milton W. Smith?

A. No, sir.

Q. Or Cox, Smith & Teal?

A. No, sir.

Q. Or Mr. Cutter?

A. No, sir.

Q. In respect to the mortgage for $25,000 you have seen the application produced in evidence?

A. Yes, sir.

Q. You presented it here?

A. Yes, sir.

287 Q. Did you have any knowledge at the time, your bank, I mean, have any knowledge, or any officers of your bank have any knowledge, respecting a guardian's deed, or any proceedings in

guardianship, involving this title or respecting the satisfaction of a mortgage by the guardian upon this property?

A. None whatever.

Mr. MURRAY: That is objected to upon the ground that the defendant bank is chargeable with everything that is in the record, and the record is in.

Mr. HUGHES: The purpose is not to negative constructive notice, but actual notice.

Mr. MURRAY: And the further objection that this witness cannot testify to what other officers or other agents of the bank may have had; he can only testify as to himself, individually.

The COURT: I think the question is objectionable on that ground. A witness ordinarily cannot testify as to whether somebody else had knowledge of a fact.

Q. You may state what, if any, information was communicated to the defendant bank in respect to the existence of the guardian's deed, or any proceedings in guardianship respecting the title upon which that $25,000 mortgage was based, respecting the title to the property upon which it was based, or respecting the satisfaction of a mortgage by P. D. Tull as guardian?

A. None whatever.

Mr. MURRAY: I object upon the same ground of the former objection that it is indefinite. It calls not only for a communication made to this witness, but to any officer or agent of the bank, and it is indefinite and uncertain as to who may have communicated it. Now, these plaintiffs and this defendant, whom I represent, are not bound by anything, or any representation that Tom, Dick,
288 Jones or Harry may have made to Mr. Tourny, or to any officer or agent of the bank, unless it was made by somebody legally authorized to act for these people, who were then infants.

The COURT: The objection is overruled. Let the answer stand.

Q. You have seen the mortgage for $100,000 that was introduced in evidence in this case also?

A. Yes, sir.

Q. And Mr. Tull testified, I believe, that that was made by taking up the mortgage for $50,000 and the one for $25,000, and adding $25,000 more. I will ask you to state what is the fact in regard thereto.

A. Such was the fact.

Q. You may state what knowledge or information was communicated through the bank, the defendant bank, at or prior to the making of that mortgage, and the advancing of the loan upon it, in respect to the existence of the institution of any guardianship proceedings, or in respect to a guardian's deed, and any interest upon the property upon which the mortgage was based, covered by the mortgage, or in respect to the satisfaction of any mortgage by P. D. Tull as guardian upon any of the property covered by the $100,000 mortgage?

Plaintiffs make the same objection.

Mr. HUGHES: This is the same question respecting the $100,000 mortgage that I asked previously.

Objection overruled. Plaintiffs except.

A. None, whatever.

Q. I will ask you what is the fact in this particular in respect to the making of the $20,000 made subsequently, and introduced in evidence in this case, covering the same property, and other property?

A. None whatever.

Q. No knowledge communicated to the bank?

A. None whatever.

289 Mr. MURRAY: I am assuming that my objection runs through the case.

Mr. HUGHES: Of course, it may be assumed that your objection applies to that.

The COURT: It may be understood.

Q. Did you ever, in the making of these loans, and the taking of any of these mortgages, did the defendant bank have any communications by letter or otherwise, respecting the title to this property, or respecting the guardianship proceedings, or respecting the satisfaction of either of these mortgages to the guardian, which have been referred to in the evidence of the plaintiffs in this case, from Mr. J. M. Kinnaird?

A. Had no information or knowledge.

Q. Did the bank ever receive any communication or information from Mr. Cutter, respecting any of these mortgages or loans, or respecting the title to the property covered by these mortgages, or with respect to the guardianship proceedings, or the satisfaction of the mortgages by the guardian?

Mr. MURRAY: I object. The bank is a corporation having a sort of an etherial existence and its legal habitation, under its name it can have no knowledge except as its individual officers have knowledge, and that would show whether the bank had knowledge. To ask the question whether the bank had knowledge is entirely too indefinite.

The COURT (after argument of counsel): Assuming now that all knowledge that comes to this bank would come through the medium of this witness, then it seems to me it is necessary only to show upon defendants' theory of the matter, as it stands now, that this witness had no such knowledge. That settles the whole case, and ordinarily I don't know of any exceptions to it. It is not competent
290 for any witness to say that such and such a corporation did so and so, or that such and such a corporation had certain knowledge. If the corporation had knowledge, or did anything, that knowledge must have been received from some person duly authorized to act for the corporation, or if any act was done by the corporation, it must have been done through some officer or agent, or other person duly authorized so to act. Objection sustained.

Defendants except.

Q. You may state, Mr. Tourny, whether you, as secretary of defendant company, ever had any knowledge or information respecting the institution, or the existence of probate proceedings, or the institution of any proceedings for the sale of any portion of this property, or the execution of a guardian's deed to F. M. Tull, or the making of any mortgage by F. M. Tull upon this property, or the satisfaction by the guardian of any mortgage given to him by F. M. Tull upon this property?

Mr. MURRAY: I object upon the ground that this corporation and its agents, as well as the public generally, are chargeable with the public proceedings of the courts, and the records of the courts, and everything that is a matter of record, and that it cannot be permitted for a witness to testify that they did not know what they are chargeable with from knowledge of the record.

Objection overruled. Plaintiffs except.

A. None whatever.

Q. You may state whether all communications addressed to the bank, or any of its officers, in relation to the business of the bank, passed through your hands?

A. They passed through my hands, sir.

Q. You may state whether any communication in writing was ever received by the bank, or any of its officers, in regard to
291 any of the matters referred to in my preceding questions from Mr. Cutter, Mr. Kinnaird, Mr. Smith, or Cox, Smith & Teal, or Mr. B. Goldsmith?

Plaintiffs make the same objection. Objection overruled. Plaintiffs except.

A. None whatever.

Q. I will include also in the question, or from Mr. F. M. Tull.

A. None whatever, as to those proceedings.

Q. I will ask you to state, Mr. Tourny, whether in respect to the last loan, or with respect to any of the loans made, represented by any of these several mortgages, either Mr. Goldsmith, Mr. Smith, Mr. Kinnaird, or Mr. Cutter, were employed or paid by the defendant company?

A. They were not.

Q. You may state whether in respect to these loans, the same course of dealing existed as you have testified to in respect to the first loan?

A. Yes, sir.

Objected to by plaintiffs as immaterial and irrelevant. Objection overruled. Plaintiffs except.

Cross-examination.

By Mr. MURRAY:

Q. I think, Mr. Tourny, you said you had been secretary of this orporation since 1886, or 1887?

A. No, I said over ten years.
Q. Over ten years?
A. Yes, sir.
Q. I think that this would make you secretary at the time *of* this first application for this Tull loan was made in 1888?
A. About that time.
Q. Do you wish to explain your answer?
A. I wish to explain. I have been in the employ of the bank for twenty years, over twenty years.
292 Q. What was the relation existing in May, 1888, and from that time onward, during the pendency of all of these transactions between your corporation and Mr. Goldsmith?
A. As to these Tull loans?
Q. As to these Tull loans and generally?

Mr. HUGHES: I think that question is too general and indefinite, and is irrelevant and immaterial, except as it relates to the Tull loan.
Objection overruled. Defendants except.

A. Mr. Goldsmith, as I have stated before, was the statutory agent for the State of Oregon, to accept service of any papers in connection with any litigation that was made upon the bank. Otherwise our relation with him was as broker, as any other broker.
Q. As any other broker?
A. As any other broker would submit an application to the bank.
Q. Did your company supply him with blanks upon which to make applications for loans?
A. No, sir.
Q. Upon all these applications, attached to them—they are all in evidence, it is not necessary for me to show each of them, is it?

Mr. HUGHES: I don't know; it will be a question of whether the witness requires that information. You will find out when you ask the question.

Q. All these applications for loans which are in evidence, you have been here and seen them, I think?
A. Yes, sir.
Q. Attached to that is a report by him with a printed head "Surveyor's report," was he authorized by you to make a survey and examination of these premises for the use of your company?
A. Not that I know of. He made his application accompanied by a valuation by him of the property, as we have from other brokers right here in Spokane. I have two or three cases in mind now. I can mention to the court if he wishes to know.
293 Q. Well, what I have asked you is, was he directly employed by your company?
A. As surveyor?
Q. As surveyor to make the examinations?
A. No, sir.
Q. Then I will ask you this: During the time that he has been

your agent for the purpose of accepting service, and that sort of thing in Oregon——

A. (Interrupting.) That is only for Oregon.

Q. (Continued.) And in all this transaction, has he been in the habit of making surveys and reporting the situation, condition and value of the property upon which loans were solicited through him?

A. As I have stated before, his applications would be accompanied by either his recommendation as to the applicant, or his valuation of the security. We would receive similar applications from other brokers and besides the bank and the officers, that is to say, the president and myself, have always been familiar with values in the respective cities where we have loaned.

Q. I assume that you would be unworthy officers if you did not keep yourselves posted?

A. Yes, sir, we have been here.

Q. Then in applications sent in to you through Mr. Goldsmith, they were always accompanied by his report generally, called a surveyor's report, in which he described the property, the improvements on it, the condition of it, and his estimate of the value of it?

A. Yes, sir.

Q. Now then, was it the habit, or did the company generally, the directors of the company, in passing upon the loan, place reliance upon his report?

A. Yes, to some extent; we had confidence in Mr. Goldsmith's judgment at least, we have placed reliance in other brokers' reports, as well.

Q. Now, in reference to these Tull loans, any of them at
294 any time, did you or the president, or the directors of your company, ever call for or require any other report as to the property, its condition, the improvements on it, or its value, than that submitted by Mr. Goldsmith?

A. No, we were personally informed as to the value of the ground, and the loans being for building purposes, we could estimate the total value ourselves.

Q. In what way were you personally informed?

A. Having been here in Spokane, Mr. Gottig, our late president.

Q. And yourself?

A. Yes, sir.

Q. I think you had not been here when this first loan was made?

A. No, I was here right after the fire, when the next loan was made, but Mr. Gottig had been here before that.

Q. So that you, and your then president had personally some knowledge about it?

A. Yes, sir. I might state for your information that in trips of this kind the president and myself, and perhaps some of the other directors, in visiting a city like Spokane, we would limit ourselves to a certain district, and establish in our minds certain values per front foot for certain blocks, and so we had a certain value for Riverside avenue between one block, and certain values for another

and there would be a sort of a guide, a check to us, when an application would be received with recommendations of values.

Q. Now, as to Mr. Kinnaird, you say you never had any communications with him at all, Mr. Kinnaird direct?

A. Between what times?

Q. In reference to these loans.

A. In reference to the Tull loans?

Q. In reference to the Tull loans from the beginning, until 1892, I think, or 1891; I will fix that a little bit. Messrs. Kinnaird & Happy were employed here as your advisers some time in 1891 and 1892, were they not?

A. Messrs. Kinnaird & Happy were designated as the
295 attorneys at Spokane whose certificate of title we would accept and loan upon, and they were designated, I think, at our meeting of the 16th of May, 1892.

Q. That was prior to the $100,000 mortgage?

A. No, sir.

Q. Afterwards?

A. No, sir, that was after the $100,000 the $100,000 mortgage. The $100,000 mortgage, I believe, was made on the 5th day of May, 1892, and that money was advanced upon a certificate of title from Milton W. Smith, successor of the firm of Cox, Teal & Smith.

Q. Now, about the $20,000 mortgage, was that made after your designation of Kinnaird & Happy, or before?

A. That was made afterwards.

Q. After?

A. Yes, sir.

Q. Now, you know nothing whatever about Mr. Kinnaird's connection with this transaction; that is, you don't know personally?

A. What is that?

Q. About Mr. Kinnaird's connection with those mortgages, and this probate proceeding. You say you don't know how he came to be connected with it?

A. No, sir.

Q. That is, you have no personal knowledge?

A. No personal knowledge and I know that the bank had no knowledge.

Q. Had you any knowledge or information from Mr. Smith, or Cox, Smith & Teal as to his action?

A. As to probate proceedings?

Q. Yes.

A. Or as to the guardianship proceedings?

Q. Had you any at the time the mortgages were given?

A. None whatever.

Q. I take it for granted that you have some information now about the things that you did not have then?

A. As I have said before, Judge, the first information we had of Mr. Kinnaird's name figuring in anything in connection with these four loans of Tull, was at the time the interrogatories in this
296 case were received, here in evidence; that is my first information, and the bank's first information.

Q. I will ask you this question: When mortgages came into your office, it was your duty, as secretary to file them and take care of them I suppose, or at least you had charge of it; possibly it was done by some clerk. I was going to ask you whether you did not examine these mortgages so that you knew they were executed before Kinnaird as a notary public and witnessed by him as a witness?

A. I don't know whether I examined these mortgages or not; the acknowledgement is a matter that the attorney who furnished the certificate is responsible for, morally, at least, to the bank.

Q. You might have looked at it, but you relied on the attorneys?

A. I don't know.

Q. Now then, do you say you were not informed and had no knowledge of the fact that a title to this property had gone through the probate court and depended on a probate sale?

A. I had no such knowledge.

Q. You had no knowledge of that kind?

A. No, sir.

Q. That is, no actual knowledge?

A. Well, we had no knowledge; I had no knowledge; if the bank had any knowledge it would have been known to me.

Q. Now then, I will ask you this: Did you know when the first application for the $40,000 loan was made, that Mr. Tull was a married man and had a wife then living?

A. I may possibly have known it, I don't remember.

Q. Did you know that before the consummation of that mortgage, that loan, and pending the negotiation for it, that his wife died?

A. I didn't know it at the time.

Q. Did you know that in consequence of her death the loan was delayed in order that the title might be made up?

297 A. I believe the loan was delayed. I have noticed from the date of the application, and the time when it was consummated, it must have been delayed for some reason or other.

Q. Are you able to state from your recollection, what the reason of it was?

Mr. HUGHES: You mean from his knowledge at the time, or his knowledge now?

Mr. MURRAY: Within his recollection.

A. At the time?

Q. Yes.

A. I don't remember whether I knew it at the time. We have a very large number of loans, as well as depositors.

Q. Now, is it not a fact, if you knew, that your company refused to consummate that loan until the title was perfected after Mrs. Tull's death, by a probate proceedings?

A. What is your question?

Q. Is it not a fact, that you know that your company refused to consummate that first loan of $40,000 after learning of Mrs. Tull's death until the title had been perfected by probate proceedings?

A. Whether that is the fact, that the bank refused to consummate the loan on that account?

Q. Yes.

A. I don't remember whether the bank took any such action at the time.

Q. Were you aware of the fact that at the time the $40,000 mortgage was executed to your bank, the next day, or within two or three days after the public sale by the guardian and the execution of the guardian's deed to F. M. Tull?

A. Were we informed of that?

Q. Yes.

A. No, sir.

Q. You had no actual knowledge?

A. No, sir; no knowledge whatever.

298 Q. Now, Mr. Tourny, at the time this $50,000 mortgage was made, the application was sent direct to your office by somebody, that is, it was received at your office?

A. Yes, sir.

Q. And you had no knowledge as to the title, except you waited for the recommendation of Cox, Smith & Teal?

A. The certificate of title of Cox, Smith & Teal, at that time, on which we loaned.

Q. And the same way as to all the different mortgages all through?

A. With the exception of the $20,000 mortgage.

Q. What was the difference with respect to that?

A. That loan was made upon the certificate of title of Kinnaird & Happy.

Q. In the meantime Messrs. Kinnaird & Happy had been designated to certify titles for you?

A. They had been designated as attorneys at Spokane whose certificate of title we would accept and loan upon, and that was done May 16th, 1892.

Q. Do you know who drew any of these mortgages, I am asking for your personal knowledge?

A. I know the handwriting that is in the body of the mortgages.

Q. Whose handwriting is it?

A. I believe the four mortgages were drawn in the office of, let's see—the four mortgages were drawn in the office of Cox, Teal & Smith, and then in Mr. Milton W. Smith's office, and the $20,000, I believe, was drawn in Messrs. Kinnaird & Happy's office.

Q. Are these mortgages all made with blanks prepared by your company and furnished by it for the purpose? I think perhaps one of them is not.

A. The mortgages are—at least, the blank form of mortgage as used in each instance is the form furnished by the bank, even in the $20,000 mortgage, the printed form is furnished by the bank.

299 Q. Were these blanks, blank forms of mortgages sent by you or somebody from your company to Cox, Smith & Teal, for use in preparing these mortgages?

A. Yes, sir.

Q. And the same to Messrs. Kinnaird & Happy after they became their attorneys?

A. After they were designated as attorneys in the manner I has said, yes.

Q. Now, when this $40,000 loan, the first one, was made, in what manner did your company pay over the money to Mr. Tull?

A. I believe principally on drafts from Mr. B. Goldsmith.

Q. Through whom?

A. How through whom? What do you mean? I don't understand the *kuestion*, Judge?

Q. Was the payment made through the First national bank of this place, or through Mr. Cutter as cashier?

A. You mean to whose order the drafts were drawn?

Q. Yes, on whose order was it paid?

A. I think the drafts were principally drawn to the order of Mr. Tull.

Q. By whom were they drawn?

A. B. Goldsmith.

Q. Through whom were they paid?

A. I think principally through the First national bank here.

Q. And was that the usual way of making payments when you advanced money to Mr. Tull?

A. Yes, it is possible we may have remitted to Mr. Tull direct a part of the money; I have no recollection.

Q. When did you first learn of this contract between Goldsmith and Tull, providing that Goldsmith and Cutter should have $1200 commission?

A. Since the commencement of this action.

Q. Did you know at the time of the transaction that Goldsmith and Cutter were taxing Tull with the commission?

A. Did we know at the time that Cutter and Goldsmith were? No, sir, but——

Q. You did not know it?

A. No, sir.

Q. Is it a fact that your company, at the same time, paid
300 Goldsmith a commission?

A. No, sir, we never paid Goldsmith a commission.

Q. Was it not a condition of making the loan, that all of the expenses and commissions were to be paid by the borrower?

A. Yes, sir.

Redirect examination:

Q. You testified that those blanks, the blank forms of these applications were not furnished by you. I will ask you whether you had anything to do with the printing on them at all, your bank, I mean?

A. No, sir.

Q. Were they ever printed or issued under the authority of the bank in any way?

A. No, sir.

Mr. HUGHES: One style of the forms shows upon its back that it was printed in Portland; they are all the same form.

Witness excused.

801 WALTER SIVYER, called as a witness on behalf of the defendants being first duly sworn, testified as follows:

Direct examination.

By Mr. HAPPY:

Q. Mr. Sivyer, you may state where you reside and what your business is?

A. I reside at 813 6th avenue; my business is real estate and insurance.

Q. 813 6th avenue in this city?

A. Spokane, Washington.

Q. How long have you been engaged in the real-estate business in this city?

A. Since December 1887.

Q. You may state to what extent you have had during that time, experience, in a general way, in the handling of real estate. Have you sold real estate?

Q. Yes, bought and sold, and sold on commission, and given values on real estate for several of the loan companies, and some of the banks and individuals.

Q. Were you acquainted with the values of real estate in Spokane in the year 1888 and 1889?

A. Yes, sir.

Q. I will ask you to state what would be the reasonable value of real estate at the corner of Howard and Riverside, say 100 feet frontage on Riverside, running back about a depth of 100 feet—99 feet and a fraction—in the year 1888, say in November?

A. Howard and Riverside?

Q. I mean Stevens and Riverside, the corner on which a part of the Tull block stands.

Q. You mean now, as to the vacant property?

Q. Yes, leaving out the improvements. Suppose it had no improvements on it, whatever, the ground itself?

A. I should say $400 a foot in 1888.

Q. $400 a foot?

A. Yes, sir.

302 Q. And the following year what would it be worth?

A. $550.

Q. Take the 50 feet immediately east of there and running back the same depth, what would that be worth a foot in 1888, say in the fall of 1888?

A. $350 a foot.

Q. Do you know where the Vendome stands, a three-story building fronting on Sprague street?

A. Yes, sir.

Q. 60 feet on Sprague, running back 80 feet. Well, before I get

to the Vendome block I will ask you to state what would be the value of this piece of ground last mentioned, the 50 feet on Riverside avenue, a part of the Tull Block property, in the fall of 1889?

A. That was worth about $450 in the fall of 1889. You mean the 50 feet adjoining the corner?

Q. Yes, sir, the center of that block, about. The description is, commencing 100 feet from the northwest corner of that block 19, and running east 50 feet and south 99.42 feet, west 50 feet, and back to the place of beginning?

A. Yes, that would be worth about $450.

Q. Now, the property mentioned fronting on Sprague street in the fall of 1888, what would that piece of ground be worth? What was it worth 60 by 80, 60 feet fronting on Sprague, by 80 feet?

A. About $250 a front foot.

Q. And the following year, in the fall, what would it be worth?

A. $350. In fact, I was about to buy it for $350 in connection with some other parties.

Q. In what year, 1889?

A. Yes, sir, after the fire.

Cross-examination.

By Mr. MURRAY:

Q. You reside here and have been in the real-estate business since 1887?

A. Yes, sir.

303 Q. Buying and selling?

A. Yes, sir, buying and selling, and also on commission.

Q. Upon your own account?

A. Yes, sir.

Q. And as a broker?

A. Yes, sir.

Q. Do you remember the fire in August, 1889?

A. Yes, sir.

Q. Do you know that from 1887 to 1889 the values of real estate went up very rapidly, don't you?

A. Yes, sir.

Q. After the fire for a year or more values remained up, did they not? There was no decrease in the values of property for a year or two after the fire, that is of business property?

A. About a year is all.

Q. You know the fact that in 1889, property on the corner on Howard street, one block west, sold for about $1000 a foot, don't you?

A. Yes, sir.

Q. Now, in November and December, 1889, about what in your judgment was the difference in the value of the property, say in the middle of the block on Riverside between Howard and Stevens and the property in the block between Stevens and Washington, where this property was? Was it as much as two to one?

A. No, I hardly think there was that difference.

Redirect examination:

Q. Now, Mr. Sivyer, is it not a fact that with reference to the corners, the three corners, with reference to Riverside and Howard street that the high price that was brought by those corners after the fire was due to the competi-on between certain banks?

A. Yes, sir. I think there were some banks bidding for those corners, and it ran up the price sharply.

Q. And further than that, is it a fact that that is a point
304 where the street cars branch off running south and north and along there is a kind of central point, is it not?

A. It is the acknowledged center of the city, and was at that time.

Q. So that the fact that those corners where the Traders' block stands and the First National Bank building stands, and across where the building built by the Spokane national bank stood, the fact that they brought fancy prices, you don't regard as tending to fix the value of property up between Stevens and Washington, or on the corner of Stevens street?

Mr. MURRAY: I object, for there is no evidence that they brought fancy prices.

Objection sustained. Defendants except.

Q. Your testimony in regard to the value of this property on the corner of Stevens and Riverside, you have given those values with knowledge of the prices that were brought by these other corners on Howard and Riverside?

A. Yes, sir.

Witness excused.

305 HARL J. COOK, called as a witness on behalf of the defendants being first duly sworn, testified as follows:

Direct examination.

By Mr. HAPPY:

Q. Where do you reside?

A. At 1121 6th street, this city?

Q. How long have you lived in this city?

A. Between 13 and 14 years, I believe.

Q. What official positions have you held in the county or city during your term of residence here?

A. I was assessor in 1895 and 1896 is the only position I have occupied.

Q. That is the only official position you held?

A. Yes, sir.

Q. What was your business in Spokane during the years 1888 and 1889?

A. I was of the firm of Cook — Byers, real estate and loans.

Q. What experience have you had before and since that in real-estate business in this city?

A. I had considerable; had done nothing else for about ten years.
Q. For ten years before and after that period?
A. Yes, sir, including that time.
Q. Your experience in real estate began at what time?
A. It began in 1887, I think; 1887 or 1888.
Q. Were you acquainted with the values of real estate in the city of Spokane in the years 1888 and 1889?
A. Yes, sir.
Q. I will ask you to state what was the reasonable value of the corner of Stevens and Riverside 100 feet fronting on Riverside, running back 99.42 feet, being where the Tull block, or a part of the Tull block now stands?
A. At what time.
Q. In the year 1888, in the fall of 1888, leaving out of consideration of course—the ground itself.
A. Well, I should say that the value would be about $450.
306 Q. Then, the following year, take it about a year later, the fall of 1889, what would be the fair valuation of the same ground?
A. Well, the valuation in 1889 was very changeable. The fire occurred the 4th of August, and up to that time the valuation would remain about the same. It was no better than it was in 1888, perhaps not over $450, until after the fire. Then we had a sudden rise in property, and it would have run along there anywhere from $500 to $575, not over that. I don't think it would run over $550. I don't think it could have been actually sold for more than that.
Q. Now, take the 50 feet adjoining that, the east 50 feet fronting on Riverside by the same depth, 99.42 feet, what would be a fair valuation of that lot or piece of ground in the fall of 1888?
A. On Riverside you say?
Q. Yes, 50 feet on Riverside, that is, commencing 100 feet on the northwest corner of that block, beginning 100 feet east and going 50 feet south, 99.42 west and back to the place of beginning?
A. That is the old post-office building?
Q. Next to where the old post-office was, 50 feet. It is the east 50 feet of that Tull building or Tull ground. This now, is the fall of 1888, before the fire.
A. In the fall of 1888?
Q. The fall of 1888, before the fire.
A. Well, that was inside property; that would not be worth as much as the other; perhaps $50 a foot less than the other.
Q. You put it about $400 a front foot?
A. $350 to $400, yes sir.
Q. Now, the following year after the fire, that would be worth what?
A. The rise on that would be in proportion to the other; it would be from $100 to $150 per front foot. There might have been times
307 that perhaps they had a larger valuation *of* that, but I know of no property along there where any values were placed for loans at more than that amount.
Q. Then you say you would put that from $450 to——

A. After the fire I should put that at from $25 to $525.
Q. $525?
A. Yes, sir.
Q. Now, do you know where the Vendome block stands?
A. On Sprague street?
Q. Yes, sir; that is, 60 feet fronting on Sprague street, running back north 80 feet. I will ask you to state what that was reasonably worth in the fall of 1888, the ground?
A. Well, I think that perhaps about $375, up to the time of the fire.
Q. And after the fire how much?
A. About $450.
Q. About as much as $450 after the fire, 60 feet by 80 feet in depth?
A. Yes, sir.
Q. You know that is not the corner; it is some distance east of the corner, just about 100 feet east of the corner, or 90 feet?
A. That is true.
Q. And only 80 feet deep?
A. I may be a little bit high on that, but it is sufficiently high, anyway.
Q. What is that?
A. That valuation is sufficiently high.
Q. It is quite high enough, you think?
A. I think so.

Cross-examination.

By Mr. MURRAY:

Q. Is it not a fact Mr. Cook, that the values of property in that part of the city and near the building part of the city rose after the fire?
A. Yes, sir, I stated that just a moment ago.
Q. Rose quite materially?
A. Yes, sir.
Q. And remained up for a year or two, a year or a year
308 and a half, or two?
A. Yes, for just about a year, I should think.
Q. I will ask you this: Are you acquainted with property on the opposite corner of Riverside, where the Great Northern Express office is, or used to be?
A. Yes, sir. Do you mean the old Holman corner?
Q. Yes.
A. Yes, sir.
Q. Do you know the fact that Mr. Holman, soon after the fire, obtained a loan of $70,000 on 100 feet on that corner?
A. No, sir; it may be a matter of record, but I was not aware of the fact.
Q. You did not know it at that time?
A. No, sir.

Witness excused.

309 H. D. CROW, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. HAPPY:

Q. Mr. Crow, you may state where you live?
A. Spokane, Washington.
Q. What is your occupation?
A. Attorney-at-law.
Q. How long have you been practicing law?
A. About 18 or 20 years. I don't remember just how long, about that.
Q. Were you engaged in the practice of law in the State of Kansas, if so state during what years.
A. Yes, sir. I was engaged in the practice in the State of Kansas from abou t March, 1886, to February 1890, continuously, at Winfield, Kansas; in the southern part of the State was my home.
Q. During your practice of the law in the State of Kansas, I will ask you to state to the court what opportunities you had to become familiar with the statute laws of the State of Kansas?
A. I had every opportunity any attorney would have. I had considerable practice there and was actively engaged in the business during all that time.
Q. (Handing witness book.) I will ask you to look at this book and state what it is.
A. This is a copy of the compiled laws of the State of Kansas; it includes all the laws of the State codified down to the year 1885, and is the book that was used by all attorneys there in the practice, and was accepted as authority as the statutes of the State by all the courts during the time I was there, with such amendments as were in the first session laws.
Q. Between the compilations of that statute and the year 1888, what session, if any, of the legislature of the State of Kansas, took place?
A. Well, this copy of the compiled laws includes all the laws of the session of 1885. The constitution of that State provides
310 for biennial sessions, in the odd-numbered years. There was one session in 1887, the early part of 1887, while I was there, and another in 1889.
Q. I will ask you to look at the book I now hand you, and state to the court what it is.
A. I have already examined this book. This is the official publication of the State of Kansas of the session laws of the legislature for 1887, and was the book that was used for the purpose of showing those laws in the courts of the State during the period I was there, that is, the laws of 1887.
Q. In 1888, Mr. Crow, did those two books contain all the statute law in force in the State of Kansas?
A. I should answer that question yes.
Q. And recognized by the lawyers?

A. Practicing attorneys in the courts of that State at that time, had no other books to refer to for all laws in force in the State of Kansas, at that time.

Q. And were admitted and read in evidence there,?

A. Yes, sir.

Q. And there were admitted in all the courts in that State as the statute laws of that State, those two books, that is up to 1888, you say?

A. Yes, sir.

Cross-examination.

By Mr. MURRAY:

Q. You are not able to say that these two books contain all of the statute law of Kansas, during the period which they purport to cover?

A. I am well satisfied they do; of course, I won't say positively that they contain all that was then used and recognized in any of the courts of that State.

Q. You never examined the records of the secretary of state's office to see whether it was a correct copy or not of the codi-

311 fication of all laws?

A. Of course, that is the qualification I wish to make. I know that these were all accepted.

Q. You are not able to say of your own knowledge that this was complete. All you mean to say that is was the compilation commonly used by lawyers?

A. It was the compilation commonly used by lawyers and was referred to by the courts of that State and by the supreme court of that State in its opinions as the statute laws of the State of Kansas.

Q. About in the same way that Hill's Code has been used by us here?

A. Yes, sir; it is referred to as Hill's Code is referred to here.

Q. It is a compilation——

A. (Interrupting.) I don't think it was as much under criticism as Hill's Code is in this State.

Q. It probably was not much better? It only purports to be a compilation, does it not?

A. I think that is all it purports to be. I never heard it questioned in the State by any lawyer.

Witness excused.

312 F. M. TULL, recalled on behalf of defendants, testified as follows:

Direct examination.

By Mr. HAPPY:

Q. In the spring, from the first of January, 1887, to the 20th day of May 1887, was there any other Frank M. Tull than yourself living in Kingman county, State of Kansas, that you know of?

A. Not that I know of.

Q. Was there any other Lucy A. Tull than the Lucy A. Tull to whom you were married?

A. Not to my knowledge.

Q. Mr. Tull, I hold in my hands here a paper which purports to be a transcript of the record of a proceeding for divorce in Kingman county, State of Kansas, in which Frank M. Tull appears to be plaintiff and Lucy A. Tull appears to be defendant, which purports to have been begun in February, 1887; the question I wish to ask you, Mr. Tull, is whether you were the person named as plaintiff in that case?

Mr. MURRAY: I object to the question. There is no evidence of any such proceeding in the Kansas court, or any other court. It cannot be proved except by the record, and an inquiry as to whether he or they are parties is improper, immaterial and irrelevant, until the record has been produced.

Mr. HUGHES: It relates simply to the order of introduction of testimony. The object of the question is simply for identification, and it is essential, and it is proper to ask it.

The COURT: I think it ought to be first determined by the court whether this record is admissible.

Mr. HAPPY: We offer the transcript of the record and proceedings of the court in Kansas.

Mr. MURRAY: I object to this purported record on the
313 ground that it is immaterial, irrelevant and incompetent in this action, and does not establish or tend to establish any defense in this action, and upon the ground that the record is not sufficiently authenticated to authorize it to be admitted in evidence in this case, and upon the ground that the court of which it purports to be a record, had no jurisdiction of the parties or of the subject-matter of the action; and upon the ground that the purported record itself shows a want of jurisdiction either over the person or of the subject-matter, and the further ground that if material at all it, in a collateral way, attempts to attack the judgment and decree of the probate court in this State, and is incompetent in that respect.

Mr. HUGHES: Judge Murray, permit me to make a suggestion. As I am anxious to have this hearing progress as fast as possible, I want to call attention to the fact that the affirmative defense which pleades this decree, stands as a defense against the demurrer. That is the law of the case, reiterated by this court in the ruling made in the inception of the case when our amended answer was filed, and I suppose the court would not care, upon the admission of testimony, to attempt to reconsider or review that, if he did it at all. So it seems to me the only question that should now be considered is, whether this decree is properly certified, whether the record presented here is a record which supports the defense. It is certified by the clerk and the judge in the manner provided by the act of Congress. That question is one, too, that goes back to and reviews the hearing upon demurrer. Would you object to allowing the

questions to be propounded to Mr. Tull and reserve this argument until some other time?

Mr. MURRAY: I have no objection.

314 Mr. HUGHES: As to the legal question involved, it can do no harm to go over and be made at the main argument.

Mr. MURRAY: That is all right.

Mr. HUGHES: The court can consider the question, and if the court excludes it for any other reason, the evidence of Mr. Tull can go out. There will be no objection to that, will there?

Mr. MURRAY: I don't know any objection to that. May it be understood that all of this is under our objection as to its materiality, to be ruled upon tomorrow morning?

The COURT: Yes, sir.

Q. (Last question read.)

A. Of course, I can't identify these papers.

Q. No, this is only a copy.

A. Copy? I don't — whether they are the identical papers or not; I don't know.

Q. The question, Mr. Tull, is, whether you are the person mentioned as plaintiff in a proceeding for divorce in Kingman county at that time?

A. I brought suit there in Kingman county, but whether this particular case was the suit I could not say, because there is nothing here that I could identify.

Q. You brought a suit for divorce?

A. Yes, sir.

Q. And who was the defendant in that divorce proceeding?

A. Lucy A. Tull.

Q. That was the same Lucy A. Tull, was it, who afterwards died here in Spokane, in 1888, in July of 1888?

A. Yes, sir.

Mr. MURRAY: I wish to examine Mr. Tull on that subject, but I don't wish to do it until we find out whether this record is to be received in evidence or not.

Mr. HAPPY: We will offer in connection with that proceeding, the statute referred to of the State of Kansas. I do not want

315 the court to pass on the objection on the ground that the jurisdiction has not been shown by the introduction of the statute; I can refer the court to the particular section of the statute and will do so now, or in the morning, as the court prefers.

The COURT: You may proceed now.

Mr. HAPPY: I will offer section 1765 of the Compiled Laws of Kansas, identified by the witness Crow, the compilation including the session laws of 1885, and laws prior thereto.

Mr. MURRAY: I wish to object to the introduction of all these statutes on the ground they are immaterial, irrelevant and incompetent, and do not tend in any way to establish a defense to this action; upon the further ground that they are not sufficiently authenticated or proven to be the statutes of Kansas.

Objection overruled. Plaintiffs except.

Defendants then read in evidence the following sections from the Kansas Code:

Sections 1765, 4457, 3871, 3875, 4464, 4465.

See them at pages 353–354–355–356.

Thereupon court adjourns to tomorrow, September 20, 1898, at the hour of 9 o'clock a. m.

316 SEPTEMBER 20, 1898—9 o'clock a. m.

Court convening pursuant to adjournment, the trial of the case proceeded as follows:

Mr. HAPPY: We now offer in evidence the next section referred to in the defendants' answer, section 2246 of the Compiled Laws of Kansas.

Mr. MURRAY: This is objected to, upon the grounds that I made yesterday, namely, that it is irrelevant, incompetent and immaterial, and that the laws are not sufficiently authenticated or proved.

Objection overruled. Plaintiffs except.

Defendants also offer in evidence section 2266 from the same code.

Mr. MURRAY: This was offered yesterday and I objected to it, and it comes up now, my objection to this transcript in the divorce case. Of course, I object to its materiality, as being immaterial, irrelevant and incompetent and not proving or tending to prove a defense. I add the further objection that it is not sufficiently authenticated. I make the further objection, that it appears upon the face of it that the court had no jurisdiction in this matter.

The objection is overruled. Plaintiffs except.

The transcript referred to is received in evidence and marked Def'ts' Ex. "L"

See ex. at page 342.

It is admitted by all parties to the record herein that the two mortgages executed by F. M. Tull to the German Savings and Loan Society, one for $100,000 and the other for $20,000, were foreclosed in the United States circuit court, for the eastern division of the district of Washington, on the — day of ——, and judgment rendered therein for the full amount of said mortgages, with interest
317 and costs, being $—; and that thereafter, at a master's sale of said premises upon the said decree of foreclosure, the entire premises described in the pleadings in this action were sold to satisfy the said judgment and decree of foreclosure, at which sale the defendant The German Savings and Loan Society, became the purchaser, and received a certificate of such purchase from said master; that the period of redemption provided by the statute law of the State of Washington has expired, and the master's deed has been executed by the master in said cause, to the defendant, German Savings and Loan Society, for the whole of said premises, which deed has been approved and confirmed by the court, and duly recorded, and thereunder the German Savings and Loan Society ever since has been and now is in the possession of the whole of said premises.

It is further admitted, that neither the plaintiffs in this action, nor the defendant Ernest B. Tull, were parties to said foreclosure proceedings.

Mr. HAPPY: I now offer in evidence a transcript of a complaint filed in this court, in case No. 8742, entitled F. M. Tull *vs.* Dora May Dormitzer and Ernest B. Tull, infants, and P. D. Tull as guardian of said Dora May Dormitzer and Ernest B. Tull, infants, and William L. Tull and Paul Dormitzer, defendants, marked Defendants' Ex. "B" for identification, and also a stipulation signed by W. A. Lewis, attorney for plaintiff, and Nash & Nash, attorneys for defendants, dismissing said action, filed on September 14, 1898, the day that this trial was to begin.

Mr. MURRAY: I object to this record as entirely immaterial, irrelevant, incompetent and not establishing, or tending to establish a defense in this suit.

318 Mr. HAPPY: It can go in, subject to the objections, and we can argue the relevancy of it on the argument of the case.

Mr. MURRAY: Did your offer include the order dismissing?

Mr. HAPPY: I did not see the order.

Mr. MURRAY: I understand there is an order entered.

Mr. HUGHES: There is no objection to adding the admission, that in pursuance of the said stipulation an order was entered dismissing said cause on the said date, 14th of September, 1898.

Mr. MURRAY: Let the order go with the rest.

The COURT: All right. The objection is overruled at this time. Plaintiffs except.

The papers referred to are received in evidence, the transcript of complaint being marked Def'ts' Ex. "B" and the stipulation Def'ts' Ex. "M." See them at pages 357–365.

Defendants rest.

319 *Rebuttal.*

F. M. TULL, being recalled on behalf of plaintiffs, testified as follows:

Direct examination.

By Mr. MURRAY:

Q. Mr. Tull, you have already testified about your disposing of your business in Kansas. When did your wife, Lucy A. Tull, leave Kansas?

Objected to by defendants as not redirect evidence, the subject having been gone into fully in plaintiffs' original case, both in the direct and the cross examination of this witness, and at length on that subject; further than that, there is no issue upon that subject.

Mr. MURRAY: They have attempted to establish a divorce here. I am going to show now that the court had no jurisdiction to render that decree.

Mr. HUGHES: On the statement of counsel, the further objection is made, that the evidence for the purpose suggested is incompetent, irrelevant and immaterial under the issues here; and the further objection is urged, that counsel cannot thus collaterally attack the judgment pleaded.

Objection overruled. Defendants except.

A. Some time in March 1887—I don't mean March, I mean January.

Q. In January 1887?

A. Yes, sir.

Q. Where was she in February, March and April, 1887?

Defendants make the same objection; same ruling. Defendants except.

A. I don't know where she was. She went to Missouri from Kansas, to her father's. I don't know where she was.

Q. Where was she on the 2nd day of April, or about that time?

320 Same objection. Same ruling. Defendants except.

A. I don't know that I know.

Mr. HUGHES: It may be understood, may it, that to all this class of testimony the same objections are being urged, without being repeated?

Mr. MURRAY: Yes, sir.

A. In April?

Q. Yes.

A. I think she was in California; California some place, likely.

Q. When did she go to California, as near as you can state?

Objected to by defendants for the same reason, and further that it is evident from the preceding answers of the witness himself, that it calls for mere hearsay from the witness. Objection overruled. Defendants except.

A. I could not say the exact time; some time in the spring.

Q. State whether you and she went to California together.

Same objection; same ruling. Defendants except.

A. We did not.

Q. When did she come to Spokane?

A. July, 1887, I think.

Q. July 1887. After she came to Spokane, state whether or not there was a marriage ceremony performed between you and her, and if so about when?

A. There was. I don't know exactly—it was either the last of July or first of August, somewhere around there.

Q. (Handing witness paper.) Was that a certificate given at the time?

Mr. HUGHES: Marriage certificate, you mean?

Mr. MURRAY: A marriage certificate.

A. (Examining paper.) Yes, sir. It is a copy, anyway; I don't know whether it is the original or not; it is a copy.

Mr. MURRAY: I offer this in evidence. It is a marriage
321 certificate made by John I. Booge, on the 13th day of August, 1887. (To defendants' counsel:) Will you concede that Booge was a justice of the peace at that time?

Mr. HUGHES: We will not raise that objection.

Mr. HAPPY: I want to raise this objection, that under the statute of Kansas, as well as of Washington, parties who were divorced were prohibited from marrying within six months thereafter. This marriage purports to have taken place within three months after the divorce was granted in Kansas. I raise that objection to it. I don't care to argue it now, but we can argue it on the final argument of the case.

Objection overruled. Defendants except.

The paper is received in evidence and marked Pl'ffs' Ex. "47."

Q. Mr. Tull, did you and Lucy A. Tull, previous to the performance of this last marriage ceremony, have a mutual agreement as to the status and condition of your property and your property rights, and if so, state what it was.

Mr. HAPPY: That is objected to as incompetent, irrelevant and immaterial; that an interest in real estate cannot be obtained by an agreement between the parties.

Mr. HUGHES: I add the further objection that it calls for oral testimony of an agreement which could have no validity under the statute of frauds, unless in writing. We object to the evidence of this witness, for the reason that it is not shown, whether this agreement, if any existed, was in writing, and the witness is called upon to state if there was an agreement, when that agreement was and would be incompetent as evidence, because calling for an
322 oral statement of the contents of an agreement which must have been in writing if it had any legal validity.

Mr. MURRAY: A parol agreement acted upon by the parties may convey real estate.

The COURT: I will hear you later on. The objection is overruled at this time.

Defendants except.

A. Well, we had an agreement; we settled up our back difficulties, and she agreed to withdraw the suit, and we remarried again.

Q. Your agreement and your remarriage followed the commencement of a suit by her, did it not?

A. Yes, sir.

Mr. MURRAY: Now, subject to objection, that is the same suit which Mr. Happy introduced the record of.

Mr. HAPPY: No, I introduced the record of a suit by Mr. Tull. The suit that you refer to is by her.

Mr. MURRAY: I beg your pardon. You are right.

Q. When she came here she did commence a suit against you, did she not?
A. Yes, sir.
Q. In order to adjust the rights between you and her?

Mr. HUGHES: We object to that as calling for a statement by this witness of the purpose and effect of a proceeding in court. The record is the best evidence.
Mr. MURRAY: So far as the purpose and effect are concerned, you are correct. She commenced a suit. That part is correct.
Q. Summons and complaint were served upon you?
A. Yes, sir.

Mr. MURRAY: I now offer in evidence from the files of this court a complaint, filed on the 28th of July, 1887, Lucy A. Tull, plaintiff, *vs.* Francis M. Tull, defendant.

Objected to by defendants as incompetent, irrelevant, and
323 immaterial.

Mr. MURRAY: And also a summons issued upon it, præcipe, a stipulation to dismiss motion.
Defendants make the same objection to the latter papers, for the reason that the papers in this controversy are papers in a controversy between parties not parties to this action, are mere declarations, not made or taken in the form of testimony, and therefore, are secondary evidence of any facts that might in any event be material to this controversy, and cannot be received here as proof in this form.

The COURT: It seems to me, Mr. Murray, that that is getting a long way off from this controversy here. (After argument of counsel.) Well, if that suit went into judgment, and there was a settlement of their difficulties, if there was anything in the nature of an agreement by which they made a division of their property, that would probably be material here, but what allegations were made in that suit, and what influences, if any, were brought to bear upon Mr. Tull to get him to make an agreement, I don't see how that is material here.
Plaintiffs except.

Q. (Handing witness paper.) Is that your signature, and the signature of Lucy A. Tull?
A. Yes, sir.

Mr. MURRAY: I have already offered these papers in evidence, and I want them to be marked as offered and excluded.
The COURT: They may be marked for identification.
Mr. HUGHES: You have not properly authenticated the documents which you are offering; my objections don't go to that. It is not necessary to further authenticate your papers.
Mr. MURRAY: I understand your objection goes to the ma-
324 teriality of the papers.
The papers referred to are here marked for identification Pl'ffs' Exs. "48" and "49," respectively. See exs. at pages 327–331.

Q. You have already stated, Mr. Tull, to call your attention to it, that after the commencement of that suit you and she agreed to a settlement of your difficulties?

A. Yes, sir.

Q. What was the agreement between you and her as to your property rights and her property rights?

Mr. HUGHES: Now, you propose to show first whether this agreement was written or oral?

Mr. MURRAY: It was oral. There was no written agreement.

Mr. HUGHES: We object to this witness testifying to any oral agreement between himself and his deceased wife, Lucy A. Tull, for the reason that it is incompetent, irrelevant and immaterial and for the further reason that the testimony of a witness as to an oral agreement is incompetent under the statute of frauds; that no agreement fixing the status of the rights and interests of the parties in and to real estate can rest in parol.

Mr. HAPPY: Further, that community interest in real estate grows out of a status, and acquisition of property under that the statutes of the State of Washington, an interest in real estate can only be acquired by deed.

Objection overruled. Defendants except.

Q. State fully, Mr. Tull, what the original agreement between you and her was.

Defendants make the same objection. Same ruling. Defendants except.

A. Well, we simply agreed to fix up our past, our differences, and remarry, let her have the interest in the property as she had had.

325 Mr. HUGHES: I did not hear the last.

A. I say, we agreed to remarry and she would withdraw the suit, and she should have an interest in the property, and there was no specific amount she should have, that she should have the interest in the property and settle up the business as man and wife, and the property be together. That was all there was to it.

Q. And that agreement was made in the settlement of the suit?

Mr. HAPPY: I object to that as leading.

Q. That agreement was made by you and her after she had commenced a suit against you, was it not?

A. Yes, sir.

Mr. MURRAY: Now, in view of what he has said, and in order to establish exactly what their agreement was, or at least, as bearing upon it, I offer again her complaint in that case, and I will state, without reading it, she claimed in this suit a community interest in the property which he acquired, and I have her complaint in that suit which they settled, which tends to establish the exact character of their agreement. I reoffer that.

Mr. HUGHES: We renew our original objection.

Same ruling. Plaintiffs except.

Q. Then, upon your arriving at that agreement, this remarriage was had, which I have already introduced?

Objected to by defendants as leading. Objection sustained. Plaintiffs except.

Q. Mr. Tull, after you wife's death, when you found it necessary to protect your title in order to get a loan, you treated the property upon the strength of the agreement which you made with her prior to the remarriage, did you not?

Objected to by defendants as leading, incompetent, not re-
326 direct examination, and as calling for a conclusion and opinion of the witness. Objection sustained. Plaintiffs except.

Q. Mr. Tull, they have offered in evidence the record of a suit brought by you in 1894. You may explain the reason and the circumstances under which you brought that suit.

Objected to by defendant as incompetent, irrelevant and immaterial.

Mr. MURRAY: Yes, sir, I think so too, but you put the record in.
Mr. HUGHES: Our objection is upon the ground that it is always incompetent for a man to give his motives or reasons. They are to be determined from the things he does—I mean as to the institution of suit, upon the mere inspection of the documents themselves.

Objection sustained. Plaintiffs except.
Mr. MURRAY: I will change the form of it.

Q. Mr. Tull, you may state the facts upon which you brought that action.

Mr. HUGHES: We object to that, for the reason that facts must be stated under our statute in the pleadings upon which he brings the astion, and the pleading is the best evidence, and that is in evidence already.
Objection sustained. Plaintiffs except.
Mr. MURRAY: I think that whole thing is immaterial.

Q. In the agreement made between you and Lucy A. Tull, just prior to your remarriage, what, if anything, was said between you and her as to the right and interest of the children in the property?

Defendants make the same objection to this question as was
327 urged to the other question in relation to that agreement. Objection overruled. Defendants except.

Q. Please answer the question, Mr. Tull.
A. I don't know that there was anything said about the children at that time.

Cross-examination.

By Mr. HAPPY:

Q. Mr. Tull, this complaint that you filed in the case commenced in 1894, which you have already been shown and identified as your signature, which you will notice there, you swore to that complaint, did you (referring to signature to Def'ts' Ex. "B")?

A. Yes, sir.

Q. At the time you swore to that complaint, Mr. Tull, did you read it; did you read the contents of the complaint?

A. I think it was read; it was read to me; I did not read it.

Q. You either read it or it was read to you?

A. Yes, sir.

Q. Who was your attorney in the commencement of that case?

A. Mr. George Turner.

Q. The present Senator George Turner?

A. Yes, sir.

Q. Now, in the 10th paragraph of that complaint, it is stated, after reciting the sales made by the guardian, and the appointment of the guardian——

Mr. MURRAY: (Interrupting.) Wait one moment. I want to make my objection right now.

Mr. HUGHES: I don't think you can ever make an objection until a question is asked. A party has a right to ask the question.

The COURT: Let counsel finish the question.

Q. (continued). After reciting in this complaint the appointment of a guardian for these children, and the sales of real estate which have been shown in evidence in this case, sales by the
328 guardian to you of certain real estate, and the giving of a $14,000 note and mortgage, and subsequently giving a $34,000 note and mortgage, after reciting that substantially, in your complaint, the 10th paragraph says: "That at the time of the sale of said property by the"——

Mr. MURRAY: I object to counsel reading from that paper as a part of his question. The paper has been admitted in evidence under my objection, and I say it is improper for counsel, in examining a witness to read over the recitation of a paper that is in evidence and then base his question on it.

The COURT: That depends on the object of the question, Judge Murray. We will wait until the question is finished.

Q. (continued). "Defendant P. D. Tull, under and by virtue of the orders of the probate court of Spokane county, the said P. D. Tull believed that the said property was the community property of plaintiff and said Lucy A. Tull, deceased, and that said defendants William L. Tull, Dora M. Dormitzer and Ernest B. Tull, as the children of plaintiff and Lucy A. Tull, had inherited a half interest in said property on the death of the said Lucy A. Tull, and this plaintiff also believes such to be the fact, and that title to a half interest in said property had thereby become vested in said defend-

ants, and the sale of said property and its purchase by plaintiff, and the execution and delivery of the said promissory notes, was the result of a mutual mistake as to the nature of the title of said defendants, and of this plaintiff, in said properties, participated in by both the defendant P. D. Tull, guardian of said minor defendants, and by this plaintiff, and said transactions would never have taken place but for the existence of said mutual mistake, and this plaintiff alleges further that the only consideration for the execution and delivery of said note was
329 the supposed interest of the said minors in the said real property, and that the said minors had no interest in said property, but that title to the same in fee-simple was then and always had been vested in this plaintiff since its purchase by him, and that the said Lucy A. Tull never had any interest in the said property, either as a member of the community, or otherwise, and that the defendants William L. Tull, Dora M. Dormitzer, and Ernest B. Tull, took no interest whatever therein as the heirs-at-law of the said Lucy A. Tull, and that the said promissory note was wholly without consideration and void, and constitutes no valid and binding obligation against this plaintiff. That plaintiff did not discover the said mistake concerning the title to said land which lead to the transactions aforesaid, until within the last two months." That is the end of the 10th section. Now, Mr. Tull, you swore to the correctness of that statement when you signed this complaint, did you not?

A. I identified that once.

Q. Do you mean, now, Mr. Tull, by your testimony, that you have given in answer to questions asked by Judge Murray, to be understood as testifying different from what is stated in that complaint? In other words, do you mean to be understood now as swearing that your wife did have an interest in that real estate by some oral agreement between you and her?

Mr. MURRAY: I object to that question; especially that part of it which is a mere reading of that complaint. I don't think it is material in the case, anyway, and if it shows anything, it shows that our present Senitor, Turner, gave him bad advice. The point is this: The question is there; he has identified the paper. He admitted last week that he signed it. He says now he has
330 sworn to it, and it is there for itself, and I think this court can judge of the effect of it by having the papers, which have been admitted in evidence subject to my objection.

The COURT: I don't think the present opinion of this witness on that subject is material. Objection sustained.

Defendants except.

Mr. HAPPY: I want to have the witness tell what he means by his testimony now. I don't understand that Mr. Tull has now sworn that Mrs. Tull had any interest in that property at the time of her death.

The WITNESS: I would like to make a statement, if the court please, for my own benefit, if you will listen.

The COURT: I don't think it necessary, Mr. Tull. The objection is sustained.

Q. I will ask you now, Mr. Tull, if the statement which I have read from this complaint, and which were signed by you, were true?

Mr. MURRAY: I object to that.

Mr. HUGHES: Before ruling upon that I want to call attention to the fact that that is manifestly the only proper course for the introduction of impeaching evidence. A document that is at variance with testimony given at one time must always be called to the attention of the witness, and he must be given the opportunity to explain, or else it does not constitute evidence that can be considered as impeachment of the testimony; if the original offer of this paper for the reasons then existing is held to be good, that is to say, if the court should ultimately say that this complaint was inadmissible for the purpose for which it was then offered, we don't use it by calling the attention of the witness to it as impeaching, and give
331 the opportunity to explain, the court cannot consider it for any purpose. Therefore, I think it necessary to lay this foundation.

The COURT: How is it in any sense an impeaching question under the testimony of this witness, if it were given?

Mr. HUGHES: I am not going to attempt to analyze the testimony of this witness, or the effect of it. I don't think he has testified to anything that can be received as evidence establishing a legal status and interest in the wife and in his children, but if counsel's contention is correct, then those allegations are utterly and absolutely at variance with any such contention. Mr. Tull declares that Lucy A. Tull had no interest whatever in the property.

Mr. HAPPY: And that statement was made after the alleged agreement.

Mr. HUGHES: After the alleged agreement and after the marriage.

The WITNESS: I would like to make an explanation there. I would like to make an explanation why the two statements are somewhat contradictory.

Mr. HUGHES: The rule is that he can answer the question yes or no, then explain it.

The COURT: Yes, answer whether this is or is not true, and then make your explanation.

Mr. MURRAY: I submit the witness has the right to make the explanation at the time, in connection with his answer.

The COURT: Certainly.

A. I supposed it was true at the time I signed it.

Q. It was true at the time you signed it?

A. And I want to say that in regard to the title I only know what I was told by my attorneys. I had been told in the first place that it was community property and treated it as such, and when
332 I advised with Mr. Turner he said under the laws of Kansas it was my property, and I brought the suit under those con-

ditions, under the advice of Mr. Turner, that under the laws of Kansas I could hold the property. I think they were both true at the time, under the advice I had as to the title; I didn't know as to the title, only as I was told.

Redirect examination:

Q. Then, this suit which they have just referred to, you brought upon the advice of Senitor Turner, to the effect that you had made a mistake, and that under the laws of Kansas you owned that property?

A. Yes, sir.

Q. It was on his advice that you brought the suit?

A. Yes, sir.

Q. And took that position?

A. Yes, sir.

Witness excused.

Mr. HUGHES: Is plaintiff through?

Mr. MURRAY: We are through.

Mr. HUGHES: We want to reoffer that complaint in the case of F. M. Tull against Dora May Dormitzer, and we want to offer it now, after Mr. Tull's testimony has been introduced.

Mr. MURRAY: I object. It has already been admitted, but I object to it again.

Mr. HAPPY: It was admitted subject to the objection existing at that time. The objections existing at the time it was then offered might be valid, but we want the benefit of the offer now.

The COURT: It is already in evidence, and I can't admit it in evidence again.

Mr. HUGHES: The court can treat it as reoffered. We don't want it in twice, but the court might, under the ruling and the
333 practice in this State, exclude it under the first offer. We want to treat it as reoffered, so it will stand for any purpose for which it may be considered when the court comes to consider the case.

The COURT: The only way to reoffer it under that theory is to have it withdrawn and reoffered. If you take that course, I will rule on it again.

Mr. HUGHES: I am willing to stand on the record of reoffer without reference to any ruling of the court at all, simply because the court, trying this case at any stage of it, if this court, or the appellate court should sustain the first objections that are made valid, they must then consider the reoffer. It stands in the record as a reoffer.

Evidence closed.

334 PLAINTIFFS' EXHIBIT "1."

This agreement made this 28th day of December, 1886 between James N. Glover and Susan T. Glover his wife of the city of Spokane Falls Spokane county Washington Territory parties of the first part, and F. M. Tull of Kingman in the State of Kansas party of the second part. Witnesseth that the said parties of the first part for and in consideration of the sum of ten thousand dollars in
335 United States gold coin to be paid as hereinafter covenanted by the party of the second part have sold and by these presents do covenant and agree to sell and convey to the said party of the second part his executors administrators or assigns the following-described real estate situated in the city of Spokane Falls county of Spokane Washington Territory and described as follows to wit: Lots five (5) and four (4) and the west half of lot three (3) in block nineteen (19) in the town of Spokane Falls according to the resurvey thereof on file in the office of the auditor of Spokane county Washington Territory excepting and reserving therefrom that part or portion of lots — (5) and four (4) heretofore sold and conveyed to Nelson Clark which part or portion is situated on the corner of Sprague and Stevens streets and is rectangular in form being ninety (90) feet on Sprague street and eighty (80) feet on Stevens street for a more particular description of which reference is hereby made to the deed from the parties of the first part to the said Clark. The said party of the second part in consideration of the premises aforesaid hereby covenants and agrees to pay to the said parties of the first part, or to their heirs executors administrators or assigns in United States gold coin at the First Nat. Bank of Spokane Falls the sum of ten thousand dollars and interest payable as follows:

Twenty-five hundred dollars without interest within thirty days from the date hereof upon the delivery of this contract as hereinafter provided. Twenty-five hundred dollars with interest thereon at the rate of one per cent. per month from the date hereof. Ninety days after the date hereof and the balance of five thousand dollars with interest thereon payable semi-annually at the rate of one per cent. a month on or before one year from the date hereof.
336 The party of the second part is to give his notes for the payment of the sums aforesaid to accord with the aforesaid terms payable to the order of the said James N. Glover and bearing even date herewith. Until the first payment is made as provided this contract to be executed in duplicate shall be placed in escrow with some person to be agreed upon and upon such payment being made on or before thirty days from date hereof shall be delivered one duplicate thereof to each party upon the full and complete payment of the said sum of ten thousand dollars as and at the time hereinafter provided the parties of the first part hereby covenant and agree to execute and deliver to party of the second part a good and sufficient warranty deed of said lands free and clear from all encumbrances except taxes accruing after this date. The parties of the first part hereby accept and reserve to themselves their executors

administrators or assigns all buildings, structures and improvements now erected and being upon the lands hereby sold with the right to remove the same at any time within six months from date hereof until which time said parties of the first part shall have the right to retain possession of said lands and on the expiration of said six months possession shall be given to the party of the second part.

In witness whereof the said parties have hereunto set their hands and seals (in duplicate), this 28th day of December A. D. 1886.

J. N. GLOVER. [SEAL.]
SUSAN T. GLOVER. [SEAL.]
F. M. TULL. [SEAL.]

Signed and sealed in presence of—
J. N. KINNAIRD.
W. M. MURRAY.

337 STATE OF WASHINGTON, } ss:
County of Spokane, }

I, W. P. Grubbe, auditor in and for Spokane county, Washington, do hereby certify that the above and foregoing instrument is a full, true and correct copy of real-est. contract, J. N. Glover to F. M. Tull, which was filed for record in my office on the 17th day — January, 1887, at 10.2– o'clock a. m. as appears from said original Book L, Deeds, page 556.

In witness whereof I have hereunto set my hand and affixed
338 my official seal, at the city of Spokane, this 14th day of Sept., 1898.

[L. S] W. P. GRUBBE,
Auditor of Spokane County, Washington.
PHIL T. BECHER, *Deputy.*

I. T. R. stamp 10c.

339 PLAINTIFFS' EXHIBIT "2."

This indenture, made this seventeenth day of June A. D., 1887, between James N. Glover and Susan T. Glover, his wife, of Spokane Falls W. T., parties of the first part, and F. M. Tull, of the same place, party of the second part:

Witnesseth, that the said parties of the first part, for and in consideration of the sum of seven thousand dollars, to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey, unto the said party of the second part, his heirs and assigns forever, all that tract or parcel of land, lying and being in the county of
340 Spokane Washington, and described as follows, to wit:

Beginning at a point on the south line of Riverside avenue ninety (90) feet east of the northwest corner of block nineteen, (19), of the town of Spokane Falls, running thence east along the south line of Riverside avenue sixty, (60), feet, thence south one hundred and seventy-nine, (179), feet, more or less, to Sprague street; thence

west along Sprague street sixty, (60), feet, thence north to the place of beginning.

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, to the said party of the second part, his heirs and assigns forever. And the said James N. Glover, one of the parties of the first part, for his heirs, executors and administrators, does covenant with the said party of the second part, his heirs and assigns, he is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same, in manner and form aforesaid; that the same is free from all encumbrances.

And the above bargained and granted lands and premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming, or to claim, the whole or any part thereof, the said party of the first part will warrant and defend.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JAMES N. GLOVER. [SEAL.]
SUSAN T. GLOVER. [SEAL.]

Signed, sealed and delivered in the presence of—
J. M. KINNAIRD.
WM. M. MURRAY.

341 TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

This certifies that on this twenty-eighth day of June, 1887, before me, the undersigned, a notary public in and for said county and Territory, personally appeared the within-named James N. Glover and Susan T. Glover, his wife, personally known to me to be the persons described in and who executed the within deed as grantors, and acknowledged to me that they signed and sealed the same as their free and voluntary act and deed.

In testimony whereof, I have hereunto set my hand and official seal the day and year in this certificate above written.

[SEAL.] J. M. KINNAIRD,
Notary Public.

342 STATE OF WASHINGTON, } ss:
County of Spokane, }

I, W. P. Grubbe, auditor in and for Spokane county, Washington do hereby certify that the above and foregoing instrument is a full, true, and correct copy of deed Glover to Tull filed for record in my office on the 30th day of June, 1887 at 9.30 a. m. as appears from original B'k 2 Deeds page 167.

In witness whereof I have hereunto set my hand and official seal at Spokane 14th day of Sept. 1898.

W. P. GRUBBE,
Auditor Spokane County.
[L. S.] PHIL T. BEC-ER, *Deputy.*

I. T. R.

343 PLAINTIFFS' EXHIBIT "3."

This indenture, made this nineteenth day of August A. D. 1887, between James N. Glover and Susan T. Glover his wife of Spokane Falls W. T. parties of the first part, and F. M. Tull of the same place, party of the second part,

Witnesseth, that the said parties of the first part, in consideration of the sum of seven thousand dollars, to them in hand paid by the party of the second part, the rec-ipt whereof is hereby acknowledged, do hereby grant bargain sell and convey, unto the said party of the second part, his heirs and assigns, forever, all that tract or parcel of land lying and being in the county of Spokane and Territory of Washington, described as follows, to wit:

Beginning at the northwest corner of block nineteen (19) of the town of Spokane Falls according to the plat of the resurvey thereof, running thence easterly along the north line of said block nineteen (19) ninety (90) feet thence south at right angles with said north line — feet more or less to the north line of the land hitherto conveyed by the said parties of the first part to Nelson Clark, thence westerly, parallel with said north line ninety feet to the west line of said block nineteen; thence north along said west line to the place of beginning.

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns, forever. And the said James N. Glover, of the parties of the first part, for his heirs, executors and administrators, does covenant with the said party of the *first* part, his heirs and assigns; that he is well seized in fee of the lands and premises aforesaid, and has
344 good right to sell and convey the same in manner and form aforesaid; that the same are free from all encumbrances; and the above bargained and granted lands and premises, in the quiet and peaceable possession of the said party of the second part his heirs and assigns, against all persons lawfully claiming, or to claim, the whole or any part thereof, the said party of the first part will warrant and defend.

In testimony whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JAMES N. GLOVER. [SEAL.]
SUSAN T. GLOVER. [SEAL.]

Signed, sealed and delivered in presence of
WILL H. ZEIGLER.
J. M. KINNAIRD.

Certified to on the 20th day of August, 1887, before J. M. Kinnaird, a notary public.

345 STATE OF WASHINGTON, } ss:
County of Spokane, }

I, W. P. Grubbe, auditor in and for Spokane county, Washington, do hereby certify that the above and foregoing instrument is a full, true and correct copy of deed, Glover to Tull which was filed for record in my office on the 22nd day August, 1887, at 10.20 o'clock a. m., as appears from said original — Book 2 Deeds, page 362.

In witness whereof, I have hereunto set my hand and my official seal, at the city of Spokane, this 14, day of Sept. 1898.

[L. S.] W. P. GRUBBE,
Auditor of Spokane Co., Washington,
By PHIL T. BEECHER, *Deputy.*

I. T. R. S.

346 PLAINTIFFS' EXHIBIT "4."

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

In Probate Court in and for said County and Territory.

To the Hon. Millard T. Hartson, judge of said court:

Your petitioner respectfully represents that William L. Tull, Dora M. Tull and Earnest B. Tull are the children of Lucy A. Tull, deceased and of F. M. Tull of Spokane county, Washington, Territory: That said William L. Tull, is of the age fourteen years past, said Dora M. Tull of the age of ten years and said Earnest B. Tull of the age of five years, and all of said minors reside with their father, F. M. Tull in Spokane county, Washington Territory.

That said minors jointly own in fee-simple an undivided one-half interest in the following-described real estate situated in Spokane county, Washington Territory, to wit:

A part — lots 3 & 4 & 5 in block 19 in the city of Spokane Falls, in said county and Territory.

That a part of said lots 3 & 4 have situated thereon a three-story brick building, and with said building and improvements is of the value of forty thousand dollars; and upon which is a mortgage of twenty thousand dollars, bearing interest at the rate of ten per cent. per annum the remainder of said lots 3, 4, & 5 are of the value of twenty thousand dollars, and a large building is in course of construction thereon with liabilities to contractors, mechanics and materialmen thereon to the sum of about thirty thousand dollars.

That the annual rental of said store building is about forty-eight hundred dollars per annum.

That said minors own an undivided one-half interest in
347 some personal property the exact value and character thereof is to your petitioner unknown.

That said minors have no guardian appointed by will or otherwise and have no relations other than your petitioner and their father F. M. Tull in said county.

That petitioner is the uncle of said minors and the said F. M. Tull

requests that petitioner be appointed guardian of said minors by reason of the premises it is necessary and petitioner prays that letters issue at once.

Dated July 23 1888.

P. D. TULL.
HOUGHTON, GRAVES & JONES,
For Petitioner.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

P. D. Tull being first duly sworn on his oath says he has heard read the foregoing petition knows the contents thereof and believes the same to be true.

P. D. TULL.

Subscribed and sworn to before me this 23 day of July 1888.

FRANK H. GRAVES,
Notary Public, Wash. Ter.

William L. Tull having read the foregoing petition, states that he is the William L. Tull referred to therein as one of said
348 minors and over the age of fourteen, and requests that P. D. Tull may be appointed his guardian.

Dated July 23 1888.

WM. L. TULL.

F. M. Tull having read the foregoing petition says he is the F. M. Tull therein referred to and the father of the minors therein mentioned; and requests that petitioner P. D. Tull may be appointed guardian of said minors.

Dated July 23, 1888.

F. M. TULL.

Filed July 23, 1888.

MILLARD T. HARTSON,
Judge and ex Officio Clerk.

349 PLAINTIFFS' EXHIBIT "5."

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

Order Appointing Guardian.

In the Probate Court of Spokane County, Washington Territory.

In the Matter of the Guardianship of WILLIAM L. TULL, DORA M. TULL, and ERNEST B. TULL, Minors.

The petition of P. D. Tull for the appointment of himself as guardian of the persons and estates of said minors coming on regularly to be heard on this 23rd day of July, 1888, and it duly appearing to this court that said minors are residents of said county and Territory and that they have estate- within the county of Spokane,

and Territory of Washington, which needs the care and attention of some fit and proper person, and which estate- is of the value of —.

And it appearing from said petition and the evidence taken herein that it is necessary to have a guardian appointed above, it is ordered that the rule of this court in regard to ten days' notice being given of said application be made null and void so far as this case is concerned.

350 It is hereby ordered that P. D. Tull be and he is hereby appointed guardian of the persons and estate- of said minors and that letters of guardianship of the persons and estate- of said minors issue to him upon his giving a bond to the Territory of Washington in the sum of ninety-six hundred dollars, and taking and subscribing the proper oath.

Done in open court this 23rd day of July, 1888.

MILLARD T. HARTSON,
Probate Judge.

Filed July 23, 1888, and entered in journal August 7, 1888.

MILLARD T. HARTSON,
Judge and ex Officio Clerk.

PLAINTIFFS' EXHIBIT "6."

Guardian's Bond.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

Know all men by these presents, that we, P. D. Tull, as
351 principal, and F. M. Tull and H. C. McCammant, as sureties, are held and firmly bound unto the Territory of Washington, in the sum of ninety-six hundred, ($9,600) dollars, for the payment of which we jointly and severally bind ourselves, our heirs, executors and administrators.

Sealed with our seals. Dated this 23rd day of July, 1888.

Whereas the said P. D. Tull was on the 23rd day of July, 1888, appointed guardian of the persons and estate of Wm. L. Tull, Dora M. Tull, Ernest B. Tull, minors, by the probate court of Spokane county, W. T., upon executing a bond according to law in the sum of ninety-six hundred ($9,600) dollars, being security as well for the real and personal estate of said minors, as also for the rents, issues, profits and interest derived from said estate while in charge as such.

The condition of this obligation is such, that if the above-bound, P. D. Tull who has been appointed guardian for Wm. L. Tull, Dora M. Tull, and Ernest B. Tull, minors, as aforesaid, shall faithfully discharge the office and trust of such guardian according to law, and shall render a fair and just account of his said guardianship to the probate court, for the county of Spokane, from time to time, as he shall thereto be required by said court, and comply with all orders of said court, lawfully made, relative to the goods,

chattels and moneys of said minors, and render and pay to such minor- all moneys, goods, chattels, title papers and effects, which may come into the hands or possession of such guardian, belonging to such minor-, when such minor- thereto shall be entitled, or to any subsequent guardian, should such court so direct, this obligation shall be void, or otherwise to remain in force and virtue, which bond shall be for the use of such minor- and shall not become void upon the first recovery, but may be put in suit from time to
352 time against all or any one or more of the obligors, in the name and for the use and benefit of any person entitled by a breach thereof, until the whole penalty shall be recovered thereon.

P. D. TULL. [SEAL.]
F. M. TULL. [SEAL.]
H. C. McCAMMANT. [SEAL.]

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

F. M. Tull and H. C. McCammant being severally sworn, each for himself, depose and say that they are residents and householders of Washington Territory, and that they are each worth the sum of forty-eight hundred ($4,800) dollars over and above all their debts, liabilities, and property exempt from execution.

H. C. McCAMMANT.
F. M. TULL.

Subscribed and sworn to before me this 23rd day of July, 1888.
MILLARD T. HARTSON,
Probate Judge.

Approved this 23rd day of July, 1888.
MILLARD T. HARTSON, *Judge.*

Endorsed: Filed 24th day of July, 1888. Recorded in Book "A," of Bonds, Spokane county, Wash. Ter. on the 7th day of Aug. 1888, on pages 213–214. Millard T. Hartson, clerk.

353 PLAINTIFFS' EXHIBIT "7."

In the Probate Court of Spokane County, Washington Territory.

In the Matter of the Guardianship of the Personal Estate of WILLIAM L. TULL, DORA M. TULL, and ERNEST B. TULL, Minors. Letters of Guardianship.

Whereas, P. D. Tull of Spokane county, Washington Territory has made application to the probate court of said county for letters of guardianship of the persons and estate of William L. Tull, Dora M. Tull and Ernest B. Tull minors and having given the bond required by law, now, therefore we do appoint the said P. D. Tull guardian of the person and estate of said minors.

Witness the Hon. Millard T. Hartson, judge of the probate court

of Spokane county, Territory of Washington, and the seal of said court affixed, this 24th day of July, 1888.

MILLARD T. HARTSON,
Judge and ex Officio Clerk.

354 TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

I do solemly swear that I will support the Constitution of the United States and the laws of Washington Territory, and that I will faithfully perform the duties of my office as guardian of the person and estate of William L. Tull, Dora M. Tull and Ernest B. Tull minors according to law.

P. D. TULL.

Subscribed and sworn to before me this 24th day of July, 1888.
MILLARD T. HARTSON.
Judge and ex Officio Clerk.

355 PLAINTIFFS' EXHIBIT "8."

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

In Probate Court in and for said County and Territory.

In Matter of Guardianship of WILLIAM TULL, DORA M. TULL, and ERNEST B. TULL, Minors.

To the Hon. Millard T. Hartson, judge of said court:

The following is a full inventory of the real and personal estate of the above minors, with the value of the same set opposite, to wit: An undivided one-half of that certain land described as follows: Commencing at a point on the south line of Riverside avenue in the town, (now city), of Spokane Falls, Spokane county, Washington Territory, one hundred (100) feet easterly from the northwest corner of block nineteen (19), thence along said line of said street in an easterly direction fifty (50) feet; thence at right angles in a southerly direction one hundred and eighty (180) feet, to north
356 line of Sprague street, thence at right angles westerly along said last-mentioned line fifty (50) feet, and thence at right angles in a northerly direction to place of beginning.

Of the entire value of forty thousand dollars, upon which there *is* mortgages aggregating the sum of twenty thousand dollars, bearing interest at the rate of ten per cent. per annum. An undivided one-half of that certain piece of land described as follows, to wit:

Commencing at the southwest corner of block nineteen in said city, and running thence in a southerly direction along the east line of Stevens street ninety-nine and $\frac{42}{100}$ (99.42) feet, thence at right angles, in an easterly direction, parallel with the south line of Riverside avenue in said city ninety feet, thence, at right angles parallel with the east line of said Stevens street, in a southerly direction, eighty (80) feet, to the north line of Sprague street in said city;

thence at right angles in an easterly direction along the north line of said Sprague street ten (10) feet, thence at right angles, parallel with the east line of said Stevens street, in a northerly direction, to the south line of said Riverside avenue, and thence in a westerly direction along said last-named line to point of beginning.

Of the entire value of about thirty thousand dollars.

All of which is respectfully submitted.

P. D. TULL, *Guardian.*

HOUGHTON, GRAVES & JONES,
Att'ys for Petitioner.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

P. D. Tull, being first duly sworn on his oath deposes and says, he is the guardian of the minors named in the foregoing inventory and the person who made and signed the same. That he knows the contents thereof and that the same contains a full state-
357 ment of all the property real and personal of said minors.

P. D. TULL.

Subscribed and sworn to before me this 28 day of July, 1888.

[L. S.] FRANK H. GRAVES,
Notary Public, Wash. Ter.

Filed August —, 1888.

MILLARD T. HARTSON,
Judge and ex Officio Clerk.

358 PLAINTIFFS' EXHIBIT "9."

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

In Probate Court in and for said County and Territory.

To the Hon. Millard T. Hartson, judge of said court:

Your petitioner represents that he was heretofore appointed guardian of William L. Tull, Dora M. Tull and Ernest B. Tull, minors, by this court, and thereafter duly qualified as such guardian according to law, as will more fully appear by the records of this court appointing your petitioner as such guardian and the bond heretofore filed by him; reference whereto is hereby made and the same is prayed to be considered as if more fully set out herein.

Your petitioner further represents that heretofore and on the 31 day of July, 1888 he filed his inventory of all the real and
359 personal property of said minors with the clerk of this court, verified by his oath, as required by law, and the same is now on file in the records of the court and reference thereto is hereby made.

Your petitioner further represents that said minors have now and have had since your petitioner's appointment, no personal property

or estate of any kind whatever and no personal estate dependent upon the settlement of any estate or the execution of any trust.

That the annual value of the real estate of said minors hereafter described is about twenty-four hundred dollars, but that no rent has been received therefrom by petitioner to this date.

Your petitioner further represents that said minors are of the age respectively of fourteen, ten and five years and reside with their father F. M. Tull in the city of Spokane Falls, Spokane county, Washington Territory.

Your petitioner further represents that said minors own jointly and equally an undivided one-half interest in and to the following-described real estate and that their father, F. M. Tull, owns the other one-half thereof, to wit:

That certain real estate described as commencing at a point on the south line of Riverside avenue in the town (now city) of Spokane Falls, Spokane county, Washington Territory, one hundred feet easterly from the northwest corner of block nineteen (19) thence along said line of said street in an easterly direction fifty (50) feet; thence, at right angles in a southerly direction one hundred eighty (180) feet, to north line of Sprague street thence at right angles, westerly along said last-mentioned line fifty (50) feet and thence at right angles in a northerly direction to place of beginning.

That upon said described real property there is a large
360 three-story brick business building and said real estate with the building thereon is of the value of about forty thousand dollars; and is incumbered by two mortgages; one for the sum of ten thousand dollars, due November 25th, 1889, and bearing interest at the rate of ten per cent. per annum payable monthly. The other securing two notes for five thousand dollars each payable to J. N. Glover, June 30th, 1889, and bearing interest at the rate of one per cent. per month; the interest on one of said notes being payable quarterly and on the other monthly.

The annual rental value of said property is forty-eight hundred dollars, which will leave a surplus of twenty-eight hundred dollars over and above the interest due on said mortgages per annum.

The above valuation, rental value and mortgages are upon the whole of said property of which said minors own an undivided one-half as aforesaid.

Said minors own the same interest and their father, F. M. Tull, a like interest in the following-described real estate, to wit:

That certain piece or parcel of ground described as follows, commencing at the northwest corner of block nineteen (19) in the town (now city) of Spokane Falls, Spokane county, Washington Territory and running thence in a southerly direction along the east line of Stevens street ninety-nine and $\frac{42}{100}$ (99.42) feet, thence at right angles in an easterly direction, parallel with the south line of Riverside avenue one hundred feet, thence at right angles parallel with the east line of said Stevens street in a northerly direction to the south line of said Riverside avenue and thence in a westerly direction along said last-named line to place of commencement.

The last above described real estate is of the entire value of about twenty-eight thousand dollars; has no buildings upon it and is of no rental value.

361 The foundation of a three-story business building has been laid thereon, covering the whole of said land; and contracts have been let and a large amount of material purchased therefor and much of it delivered and on the ground; and said real estate is liable to liens of contractors and materialmen therefor in the sum of thirty thousand dollars or more than the value of the real estate. That said work was commenced and said liability incurred prior to said minors having acquired or owned any interest therein and they took the same subject thereto.

The value of the last above described real estate and the liens thereon as above set out are of the whole interest in said real estate, of which said minors own an undivided one-half and their father, F. M. Tull the other half as aforesaid.

Said minors have no means or money or income wherewith to complete said building or discharge the liabilities for labor and material already placed thereon, and the law of Washington Ter. does not authorize any court to order or allow a mortgage of real estate of minors.

Your petitioner alleges that the last above described real estate of said minors is in such condition that no rents can be derived therefrom and that the labor and material placed thereon will be lost and said real estate will be sacrificed if the same is not sold, and he alleges that a better investment of the value of said wards' real estate may be made by selling the last above described real estate with said foundation thereon and investing the proceeds thereof in mortgage loans upon real estate in the said city of Spokane Falls, until the above-mentioned mortgages of said first above described real estate fall due and applying so much of the same as may be necessary to their liquidation and subject to the order of this court and continuing the balance on loans as aforesaid as applying it to the purchase of other real estate as this court may from time to time direct.

362 In view of the premises your petitioner alleges that it would be beneficial to said minors to sell their interest in the real estate secondly described.

Wherefore he prays that an order may be made directing notice to be given requiring all persons interested to show cause on a day to be fixed by the court why such order should not be made, as provided by law, and that on the hearing of this petition and show-cause order an order of sale of said property may be made as provided by law in such cases.

P. D. TULL,
Guardian of said Minors.

HOUGHTON, GRAVES & JONES,
Att'ys for said Guardian.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

P. D. Tull being first duly sworn on his oath deposes and says that he is the guardian named in foregoing petition of the minors therein named that he has read the foregoing petition, knows the contents thereof, and that the same and the matters and things therein alleged are true.

P. D. TULL.

Subscribed and sworn to before me this 31st day of July, 1888.
[L. S.] FRANK H. GRAVES,
Notary Public, Wash. Ter'y.

Filed August 1, 1888,
MILLARD T. HARTSON,
Judge and ex Officio Clerk.

Filed August 1, 1888. Recorded in the records of said court in Book "A" of Petitions on pages 229, 230, 231, 232.
MILLARD T. HARTSON,
Judge and ex Officio Clerk of said Court.

363 PLAINTIFFS' EXHIBIT "10."

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

In Probate Court in and for said County and Territory.

On reading the petition, — P. D. Tull, guardian of William L. Tull, Dora M. Tull and Ernest B. Tull, minors, for the sale of the following-described real estate of said minors, to wit: an undivided one-half interest in and to that certain piece or parcel of land described and bounded as follows, commencing at the northwest corner of block 19 in the town (now city) of Spokane Falls, Spokane county, Washington Territory, and running thence in a southerly direction along the east line of Stevens street ninety-nine and forty-two one-hundredths (99.42) feet; thence at right angles in an easterly direction parallel with the south line of Riverside avenue one hundred feet; thence at right angles parallel with the east line of said Stevens street, in a northerly direction to the south line of Riverside avenue, and thence in a westerly direction along said last-named line to place of beginning.

It is ordered by the court that all persons interested appear at the court-room of said court in said county, in the court-house in Spokane Falls, Spokane county, Washington Territory, on the 3rd day of September, 1888 at the hour of 10 o'clock a. m. of said day, to show cause, if any they have, why an order should not be granted to said guardians to sell said real estate as provided by law.

It is further ordered that all persons interested shall be served with a copy of this order as provided by law, and that the same be

published in the Spokane Weekly Review, a weekly paper published once a week in the city of Spokane Falls, Spokane county, Washington Territory for four consecutive weeks.

364 Done this 1st day of August, 1888.

MILLARD T. HARTSON,
Probate Judge.

Filed Aug. 1 1888.

MILLARD T. HARTSON,
Judge and ex Officio Clerk of said Court.

365 TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

I, James Glispin, sheriff of said county and Territory, do hereby certify that I served a true and correct copy of the within order on the therein-named William L. Tull and Ernest B. Tull and on their father, F. M. Tull, on this 27 day of August A. D. 1888 in said county and Territory by then and there delivering personally to each of them said named persons a true and correct copy of said order.

Dated this 27th day of August, 1888.

JAMES GLISPIN,
Sheriff of Spokane County, W. T.,
By GUS. MARTIN, *Deputy.*

Filed 3rd Sept. 1888.

MILLARD T. HARTSON,
Judge and ex Officio Clerk.

366 Certificate of sheriff of Lincoln county, Washington Territory, showing service of a true copy of said order on Dora M. Tull, made August 21, 1888, at Sprague, said county.

Filed September 3, 1888.

MILLARD T. HARTSON, *Judge.*

Affidavit of business manager of the Spokane Review, showing publication of said order for five consecutive weeks and made September 1, 1888.

Filed September 3, 1888.

MILLARD T. HARTSON, *Judge.*

367 PLAINTIFFS' EXHIBIT "11."

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

In Probate Court in and for said County and Territory.

In re Guardianship of WILLIAM L. TULL, DORA M. TULL, and ERNEST B. TULL, Minors.

The above matter coming on to be heard before me this day upon the petition of P. D. Tull, guardian of said minors, for leave and directions to sell the following-described real estate of said minors,

to wit: an undivided one-half interest in and to that certain real estate described and bounded as commencing at the northwest corner of block nineteen, (19), in the town, (now city), of Spokane Falls, in Spokane county, Washington Territory, and running thence in an southerly direction along the east line of Stevens street, ninety-nine and $\frac{42}{100}$, (99.42), feet, thence at right angles, in an easterly direction, parallel with the south line of Riverside avenue one hundred feet, thence at right angles parallel with the east line of said Stevens street in a northerly direction to the south — of Riverside avenue and thence in a westerly direction along said last-named line to place of commencement. And upon the proofs had in open court.

368 And the court being fully advised in the premises, finds as fully proven, that said minors are the only children of Lucy A. Tull, deceased, and are the sole heirs of said deceased; that said minors own jointly an undivided one-half interest in said real estate, and that their father, F. M. Tull, owns the other undivided one-half thereof, and that no other person owns any interest therein.

The court further finds that all the allegations of said petition are true, and that it is necessary to sell the same in order to prevent a sacrifice thereof, and that it is for the best interests of said minors that the same be sold and the proceeds thereof invested in mortgage loans.

It is therefore ordered, adjudged and decreed by the court, that said guardian be, and he hereby is, ordered, adjudged and decreed, to sell said real estate at public auction to the highest bidder for cash, first giving notice of the time and place of said sale in the manner provided by law. That before such sale he enter into a bond in the sum of $28,000, conditioned as provided by law.

Done in open court this 3rd day of September, 1888.

MILLARD T. HARTSON,
Probate Judge.

Filed Sept. 3rd, 1888. Recorded in the records of said court in Book "B" of Probate Journals on page 279. Sept. 25, 1888.

MILLARD T. HARTSON,
Judge and ex Officio Clerk of Court.

369 PLAINTIFFS' EXHIBIT "12."

Know all men by these presents, that we, P. D. Tull, as principal, and C. F. Jackson and F. M. Tull, as sureties, are held and firmly bound unto the Territory of Washington in the penal sum of twenty-eight thousand dollars, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators firmly by these presents.

Witness our hands and seals this 22nd day of September, 1888.

The condition of the above obligation is such that whereas the above-bounden P. D. Tull, guardian of William L. Tull, Dora M. Tull and Ernest B. Tull has been directed by order of the probate court in and for Spokane county, Washington Territory, to sell cer-

tain real estate belonging to said minors and particularly described in the order therefor made and entered by said court on September 3, 1888.

Now, therefore, if said guardian shall well and faithfully perform said order and account to said court for the proceeds of said
370 sale in the manner and as provided by law then this obligation to be void, otherwise to remain in full force and effect.

P. D. TULL. [SEAL.]
C. F. JACKSON. [SEAL.]
F. M. TULL. [SEAL.]

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

C. F. Jackson and F. M. Tull, being first duly sworn, each for himself and not one for the other, on his oath states, that he is a resident and householder in Spokane county, Washington Territory and worth the sum of fourteen thousand dollars over and above all debts and liabilities and exclusive of property exempt from execution.

C. F. JACKSON.
F. M. TULL.

Subscribed and sworn to before me this 24th day of September, 1888.

MILLARD T. HARTSON,
Probate Judge.

Approved September 24, 1888.

MILLARD T. HARTSON,
Probate Judge.

Filed Sept. 24, 1888.

MILLARD T. HARTSON, *Judge.*

371 PLAINTIFFS' EXHIBIT "13."

Notice of Guardian's Sale of Real Estate.

Notice is hereby given that in pursuance of an order of the probate court of Spokane county, Washington Territory, made on the 3rd day of September 1888, in the matter of the application of P. D. Tull, guardian, for an order to sell the hereinafter-described real estate of William L. Tull, Dora M. Tull and William Tull, minors, and his wards, the undersigned, the guardian of the said minors, will sell at public auction to the highest bidder, and subject to confirmation by said probate court, on the 20th day of October, A. D. 1888 at ten o'clock, a. m., at the premises in Spokane Falls, Spokane county, Washington Territory, all the right, title, interest and estate of the said minors in and to all that certain piece or parcel of land situate, lying and being in the said county of Spokane, Territory of Washington, more particularly described as follows: An undivided one-half interest in and to the following, to wit: Commencing at the

northwest corner of block nineteen (19) in the city of Spokane Falls, and running thence in a southerly direction along the east line of Stevens street ninety-nine and $\frac{42}{100}$ (99.42) feet; thence at right angles in an easterly direction parallel with the south line
372 of Riverside avenue one hundred (100) feet; thence at right angles parallel with the east line of Stevens street in a northerly direction to the south line of said Riverside avenue; and thence in a westerly direction along said last-named line to the place of commencement.

Terms and conditions of sale: Cash.

P. D. TULL,
Guardian of said Minors.

Filed Oct. 3, 1888.

M. T. HARTSON, *Judge.*

Affidavit of Posting Notice Annexed.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

Gus Martin, deputy sheriff of said county and Territory, being duly sworn, on his oath says that he is a citizen of the United States over the age of 21 years, and — interested in or party to the estate of said minors; that on the 29th day of September 1888, he posted correct and true copies of the notice hereto attached in ten public places in said county, one of which was at the place where said court is held, one the premises, one on front of store at Cowley's bridge, one on fence post 4 miles south of Spokane Falls on Rockford road, one on front of store at Deep Creek Falls, one on store at Medical lake, one on school-house at Marshall, one on store at Cheney, one on school-house on Wild Rose prairie, one on store at Rockford.

GUS MARTIN.

Filed Oct. 10, 1888.

Subscribed and sworn to before me this — day of ——, 188–.

MILLARD T. HARTSON,
Probate Judge, Spokane County, W. T.

373 Affidavit attached of publisher of Spokane Falls Chronicle, a paper of general circulation, showing that said notice was published in said paper for four consecutive weeks, first publication being September 27, 1888.

Filed November 26, 1888.

MILLARD T. HARTSON, *Judge.*

374 PLAINTIFFS' EXHIBIT "14."

TERRITORY OF WASHINGTON:

In the Matter of Estate of WILLIAM L. TULL, DORA M. TULL, and ERNEST B. TULL, Minors.

To the Hon. Millard T. Hartson, judge of probate court, Spokane county:

I, P. D. Tull guardian of said minors do hereby certify and report that by virtue and in pursuance of an order of this court made by this court and delivered to me on the 3rd day of September 1888 ordering me to sell a portion of the real estate of said minors, as their guardian—to wit: all the right, title interest and estate of said minors in and to all that certain lot, piece or parcel of land, situate lying and being in the county of Spokane, and Territory of Washington, to wit: an undivided one-half interest in and to the following, to wit: Commencing at the northwest corner of block nineteen, (19), in the city of Spokane Falls, and running thence in a southerly direction along the east line of Stevens street ninety-nine and $\frac{42}{100}$ feet, thence at right angles in an easterly direction parallel with the south line of Riverside avenue one hundred (100) feet,
375 thence at right angles parallel with the east line of Stevens street in a northerly direction to the south line of said Riverside avenue and thence in a westerly direction along said last-named line to the place of commencement. I did on the 29th day of September 1888, cause to be posted in ten of the most public places in the county where said land is situated notices of the time and place of said sale as will appear by the affidavit hereto attached marked "A," and made a part of this report and that I caused a like notice to be published in Spokane Falls Chronicle, a newspaper in the Territory, in general circulation in said county for three consecutive weeks next before such sale—in which notice said lands were described with certainty, as will appear by the affidavit of W. D. Knight, marked "B" hereto attached, and made a part of this report.

That at the time and place mentioned in said notice to wit, on the 20th day of October, 1888, at 10 o'clock a. m., at the premises described in said notice, in Spokane Falls, Spokane county, Washington Territory, I offered the said described real estate for sale at public auction to the highest bidder, upon the terms mentioned in said notice of sale to wit: cash, and F. M. Tull having bid the sum of fourteen thousand dollars for the same the said described real estate was then and there struck off and sold to him the said F. M. Tull, for the sum of fourteen thousand dollars cash, he being the highest bidder, and that being the highest bid therefor. I further certify and report that I am not directly or indirectly interested in the purchase of said real estate, that said sale was legally and fairly conducted as to all of its proceedings and that the said sum bid therefor and for which it was struck off and sold, is not disproportionate to the value of said real estate as I verily believe.

Wherefor- I pray that said sale may be by the order of this court confirmed, and that I be directed and authorized to execute
376 and deliver to the purchaser a good and sufficient deed of said premises upon his complying with the terms of the sale.

P. D. TULL, *Guardian.*

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

P. D. Tull, being duly sworn says that he is the guardian of William L. Tull, Dora M. Tull and Ernest B. Tull, minors, that he has heard read the foregoing report and knows its contents, and that he verily believes the same to be true.

P. D. TULL.

Subscribed and sworn to before me the 26 day of Nov. 1888.

HORACE E. HOUGHTON,
Notary Public, Wash. Ter.

No notarial seal.
Filed Nov. 26th, 1888.

MILLARD T. HARTSON,
Probate Judge and ex Officio Clerk of said Court.

377 PLAINTIFFS' EXHIBIT "15."

TERRITORY OF WASHINGTON:

Order Confirming Sale.

In Probate Court, Spokane County.

In the Matter of the Guardianship — WILLIAM L. TULL, DORA MAY TULL, and ERNEST B. TULL, Minors.

At a regular term of the probate court of Spokane county, held in and for said county on the fourth Monday being the 26th day of November, 1888.

Present: Hon. Millard T. Hartson probate judge.

An order having been duly made on the third day of September, 1888, in this court authorizing P. D. Tull guardian of said minors to sell a portion of the real estate of his wards, said minors, to wit, all the right title interests and estate of said minors in and to all that certain lot piece or parcel of land situate lying and being in the county of Spokane, Territory of Washington, more particularly described as follows, to wit: an undivided one-half interest in
378 and to the following, to wit: Commencing at the northwest corner of block nineteen, (19), in the city of Spokane Falls, and running thence in a southerly direction along the east line of Stevens street, ninety-nine, and $\frac{42}{100}$, (99.42) feet, thence at right angles in an easterly direction parallel with the south line of Riverside avenue one hundred (100) feet, thence at right angles parallel with the east line of Stevens street in a northerly direction to the south

line of said Riverside avenue, and thence in a westerly direction along said last-named line to the place of commencement.

And the said guardian, P. D. Tull, having made his return of his proceedings under said order by which return, it appears that by virtue and in pursuance of said order, the said P. D. Tull, guardian, having caused to be posted and published due notice of the time and place of the holding of said sale as provided by law and said order did at the time and place mentioned in said notice to wit, on the premises in Spokane Falls, Spokane county, Washington Territory, on the 20th day of October, 1888, at 10 o'clock a. m., sell at public auction to the highest bidder the premises mentioned in said order, and hereinbefore described and that *on* said sale he sold the said described premises to F. M. Tull for the sum of fourteen thousand dollars, he being the highest and best bidder, and that being the highest sum bid therefor, and the said P. D. Tull having on this day appeared in court and moved for an order confirming said sale and directing and authorizing a conveyance of the premises so sold, to be made and delivered by him to said F. M. Tull upon his complying with the terms of said sale, and no one appearing to oppose said motion and no objection to the confirmation of sale, having been filed and the court having examined the proceedings of said guardian upon said order of sale and upon proof taken, it ap-
379 pearing to the court that said sale was fairly conducted, and that the sum for which said premises were sold is not di-proportionate to the value thereof.

It is ordered and decreed, that said sale so made by the said guardian P. D. Tull to F. M. Tull, be and the same is hereby confirmed and this court by virtue and in pursuance of the statute in such cases made and provided further orders and decrees, directs and authorizes the said P. D. Tull as guardian of said minors aforesaid, to execute and deliver a conveyance of said real estate so sold by him to the said F. M. Tull purchaser thereof, upon his complying with the terms of said sale, to be by him complied with.

Done in open court thic 27th day of November, 1888.

MILLARD T. HARTSON,
Probate Judge.

Filed Nov. 27, 1888, and recorded in the records of said court in Book B of Probate Journals, on page- 318–319, December 6th, 1888.

MILLARD T. HARTSON,
Judge and ex Officio Clerk of said Court.

380 PLAINTIFFS' EXHIBIT "16."

This indenture, made the twenty-eighth day of November A. D. one thousand eight hundred eighty-eight by and between P. D. Tull, the duly appointed qualified and acting guardian of William L. Tull Dora M. Tull and Ernest B. Tull, minors, the party of the first part, and F. M. Tull of Spokane Falls Wash. Ter. party of the second part,

Witnesseth: That whereas, on the third day of September 1888

the probate court of the county of Spokane, in the Territory of Wash., made an order of sale authorizing the said party of the first part to sell certain real estate of the said minors situated in the city of Spokane Falls, Spokane county, Washington Territory and specified and particularly described in said order of sale, on record of the office of said probate court and which original order is hereby referred to and hereby made a part hereof, and whereas, under and by virtue of said order of sale and pursuant to legal notices given thereof the said party of the first part on the twentieth day of October 1888, at the premises, in said city, county and Territory at the hour of ten o'clock in the forenoon of said day offered for sale at public auction the said real estate situated in the said city and county and specified and described in said order of sale, as aforesaid, and at such sale the said party of the second part became the purchaser of the whole of the real estate hereinafter particularly described and described in said order of sale for the sum of fourteen thousand dollars, he being the highest and best bidder and that being the highest and best sum bid,

And whereas, the said probate court, upon the due and legal return of his proceedings under the said order of sale made by the party of the first part, on the 26th day of November 1888, after the making of said sale did on the same day and at the next
381 term of said court, after the making of said return,—and sale, make an order confirming said sale and directing a conveyance to be made and executed to the party of the second part, which order of confirmation and direction of conveyance is now on file and of record in said probate court, and is hereby referred to and made a part hereof.

Now, therefore, the said P. D. Tull, the guardian of the persons and estates of said William L. Tull, Dora M. Tull and Ernest B. Tull, minors, as aforesaid, the party of the first part, pursuant to said orders of the said probate court, for and in consideration of the sum of fourteen thousand dollars to him in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns forever, all the right, title interest and estate of the said William L. Tull, Dora M. Tull and Ernest B. Tull, minors, in and to all that certain lot, piece or parcel of land, situate, lying and being in the said county of Spokane, Territory of Washington, more particularly described as follows, to wit: an undivided one-half interest in and to the following, to wit: Commencing at the northwest corner of block nineteen (19) in the city of Spokane Falls, and running thence in a southerly direction along the east line of Stevens street ninety-nine $\frac{42}{100}$ (99.42 ft.) thence at right angles in an easterly direction parallel with the south line of Riverside avenue one hundred (100) feet, thence at right angles parallel with the east line of Stevens street in a northerly direction to the south line of said Riverside avenue and thence in a westerly direction along the last-named line to the place of commencement.

To have and to hold all and singular the above mentioned and

described premises, together with the appurtenances, unto the
382 said second party, his heirs and assigns forever.

In witness whereof, the said first party, guardian as aforesaid, has hereunto set his hand and seal on the day and year first above written.

P. D. TULL, [SEAL.]
Guardian of the Persons and Estates of William L. Tull, Dora M. Tull, and Ernest Tull, Minors.

Signed, sealed and delivered in presence of
H. E. HOUGHTON.
JAS. R. DABNEY.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

This certifies that on the 28th day of November, 1888, *to* the undersigned a notary public in and for said county and Territory — to me personally known to be the person who signed the within instrument as the guardian of the estates and persons of William L. Tull, Dora M. Tull and Ernest B. Tull and acknowledged that he signed and sealed the same as guardian of the estates and persons of William L. Tull, Dora M. Tull and Ernest B. Tull, minors, freely and voluntarily for the uses and purposes therein mentioned.

Given under my hand and official seal on the day & year in this certificate first above written.

HORACE E. HOUGHTON,
Notary Public, Wash. Ter.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

This certifies that this instrument was filed for record in the office of the auditor of Spokane county, on the 30 day of November, 1888, at the request of F. M. Tull.

B. C. VAN HOUTEN,
Auditor Spokane County, W. T.,
By A. R. VAN HOUTEN, *Deputy.*

383 PLAINTIFFS' EXHIBIT "17."

This indenture of mortgage, made and entered into on this sixth day of December 1888, by and between Francis M. Tull, unmarried, of Spokane county, Territory of Washington, the party of the first part, and the German Savings and Loan Society, a corporation duly incorporated under the laws of the State of California, with its principal office in the city of San Francisco, State of California, party of the second part.

Witnesseth: That said party of the first part, for and in consideration of the sum of forty thousand dollars, gold coin of the United States, to him paid, the receipt whereof is hereby acknowledged has

granted, bargained, sold and conveyed, and by these presents, does grant, bargain, sell and convey, unto the said party of the second part, its successors and assigns, those certain premises situated in the county of Spokane aforesaid, and described as follows, to wit:

Beginning at the northwest corner of block nineteen, (19), of the town (now city) of Spokane Falls according to the map of resurvey and addition thereof on file in the office of the auditor of said county, and running thence south on the east line of Stevens street ninety-nine $\frac{42}{100}$, (99.42) feet; thence east parallel with the south line of Riverside avenue one hundred, (100), feet; thence north parallel with the east line of Stevens street ninety-nine $\frac{42}{100}$ (99.42) feet, more or less, to the south line of Riverside avenue; thence west along said south line of said Riverside avenue, one hundred feet to the place of commencement.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

384 To have and to hold the said described premises unto the said party of the second part, its successors and assigns, for its own use, benefit and behoof forever, the said party of the first part hereby covenanting to and with the said party of the second part, its successors and assigns, that he is lawfully seized of said premises, and now has a valid and unencumbered fee-simple title thereto, and that he will, and his heirs, executors, and administrators shall forever warrant and defend the same against all lawful claims and demands.

The condition of the foregoing conveyance is such, that whereas the said party of the first part has executed to the party of the second part his promissory note, which is in substance as follows:

$40,000. SPOKANE FALLS, W. T., *December* 6, 1888.

On the sixth day of December, 1891, without grace, for value received, in gold coin of the United States, at its office in the city and county of San Francisco, State of California, I, Francis M. Tull, promise to pay to the German Savings & Loan Society, or order, the sum of forty thousand dollars, in gold coin of the United States, with interest thereon from date, until paid, at the rate of eight per cent. per annum, said interest payable quarterly in like gold coin, and if not paid as it becomes due, is to be added to the principal sum, and become a part thereof, and thereafter is to bear interest at the same rate. And in case said quarterly interest, or any part thereof, is not paid within ten days after the same becomes due and payable, then the whole of said principal sum and interest shall forthwith become due and payable, at the election of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay, in addition to the costs and disbursements provided by statute, such sum as the court may adjudge reasonable as attorneys' fees in said suit or action. And I further prom-

385 ise to pay, on or before the first day of March in each year at said office in San Francisco, the taxes assessed in Washing-

ton Territory upon the mortgage of even date herewith, given to secure this note and the debt thereby secured.

(Signed) F. M. TULL.

And whereas, the said party of the first part has covenanted and agreed and does hereby covenant and agree, to pay all said sums of money, the principal and interest specified in said note, at the times therein designated, and to keep up in all manner, the improvements on said premises, and to pay all taxes, assessments and encumbrances of every kind which may by law become due and payable on said premises, and also all taxes which may be levied or imposed on this mortgage, or the money thereby secured, at his own expense, to keep insured against loss by fire to the extent of not less than forty thousand dollars, the present buildings, or any which may hereafter be erected on said premises during the existence of this debt, in such company as the party of the second part, its successors or assigns, may elect, loss, if any, under such insurance, payable to said party of the second part, its successors or assigns, and to deliver the policies and renewals thereof to the said party of the second part promptly after the issue thereof; and also that the said party of the first part will not commit or suffer waste upon said premises.

Now, therefore, if the said party of the first part shall pay said promissory note in accordance with the terms thereof, both principal and interest, and all taxes, assessments, insurance, and all other encumbrances, in accordance with the terms of this mortgage, and shall fully satisfy and comply with the covenants hereinbefore set forth, then this conveyance to be void and of none effect; but otherwise to remain in full force and virtue as a mortgage to secure
386 the payment of said promissory note in accordance with the terms thereof, and a performance of the conditions and agreements herein contained, and as such subject to foreclosure; it being agreed that any failure to make any of the payments provided for in said note, or this mortgage, for a period of ten days after the same shall become due and payable, or to perform any agreement herein contained, shall give to the party of the second part, its successors or assigns, the option to declare the whole amount due on this note, or unpaid thereon, or on this mortgage, at once due and payable; and that if the said party of the first part shall fail to pay the taxes, assessments, insurance or other encumbrances, as herein provided to be done, the party of the second part, its successors or assigns, shall have the option to pay the same, and the payment so made shall be added to and become part of the amount secured by this mortgage, and draw interest at the rate of ten per cent. per annum, payable annually, without waiver, however, of any rights arising from the breach of any of the covenants herein.

It is further expressly agreed:

1st. That in case of filing a bill to foreclose this mortgage, the court may, on the motion of the party of the second part, its successors or assigns, appoint a receiver to collect the rents and profits arising out of said premises during pendency of such foreclosure,

and until the right of redemption expires, and such rents and profits shall be applied in payment *pro tanto* of the amount due under this mortgage.

2nd. In the event of this mortgage being foreclosed, the said party of the first part shall pay such sum as the court may adjudge reasonable as attorneys' fees in said suit, and subject to this mortgage, the same shall be a lien upon said described premises; which said fee shall be due when suit is begun and shall be recovered
387 whether final decree be entered or not and as a part of the costs of the commencement of said suit.

In witness whereof, the said party of the first part has hereunto set his hand and affixed his seal this the day and year first above written.

FRANCIS M. TULL. [L. S.]

Signed, sealed and delivered in the presence of us as witnesses:
FRANK C. NASH.
J. M. KINNAIRD.

TERRITORY OF WASHINGTON, } ss:
Spokane County, }

Be it remembered, that on this the twenty-first day of December 1888, before me, the undersigned, a notary public within and for the said county and Territory, personally appeared the within-named Francis M. Tull, personally known to me to be the individual described in, and who executed the within instrument, and to me acknowledged that he executed the same for the purposes therein mentioned, as his free and voluntary act and deed.

In witness whereof, I have hereunto set my hand and notarial seal, the day and year first above written.

[SEAL.]

J. M. KINNAIRD,
Notary Public for Washington Territory.

TER. OF WASH., } ss:
Spokane County, }

I certify that the within instrument of writing was received for record on the 21st day of Dec. 1888, and recorded on page 518 in Book S record of mortgages of said county.

B. B. VAN HOUTEN,
County Clerk for said County.

Request 1st nat'l bank.

388 PLAINTIFFS' EXHIBIT "18."

This indenture, made this first day of March 1888 between F. M. Tull, (widower), of Spokane Falls, W. T., the party of the first part, and P. D. Tull, as guardian of Wm. M. Tull, Dora May Tull and Ernest B. Tull, minors, the party of the second part.

Witnesseth: That the party of the first part, for and in consideration of the sum of fourteen thousand dollars gold coin of the

United States, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to his successors the following-described tract or parcel of land lying and being in the county of Spokane and Territory of Washington, and particularly bounded and described as follows:

Commencing at the northwest corner of block nineteen (19) in resurvey and addition to the town of Spokane Falls, thence
389 southwardly along the east line of Stevens street ninety-nine $\frac{4}{10}$ feet, thence at right angles eastwardly, and parallel with the south line of Riverside avenue one hundred (100) feet; thence at right angles parallel with east line of Stevens street northerly to south line of Riverside avenue; thence westerly, along said south line of Riverside Ave. to place of commencement.

Together with all and singular the hereditaments and appurtenances thereunto belonging.

This conveyance is intended as a mortgage to secure the payment of fourteen thousand dollars, gold coin of the United States, together with interest thereon in like gold coin at the rate of ten per cent. per annum from date until paid, according to the terms and conditions of one certain promissory note bearing even date herewith made by F. M. Tull, payable to P. D. Tull, guardian of Wm. L. Tull, Dora M. Tull and Ernest B. Tull, minors, and these presents shall be void if such payment be made according to the terms and conditions thereof. But in case default be made in the payment of the principal or interest of said promissory note, or any part thereof, when the same shall become due and payable according to the terms and conditions thereof, then said party of the first part, and his successors are hereby empowered to sell the said premises with all and every of the appurtenances, any or part thereof in the manner prescribed by law, and out of the money arising from such sale to retain the whole of said principal and interest, whether the same shall be then due or not together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid to the party making such sale, on demand of the party of the second part, his heirs or assigns. And in any suit or other proceedings that may be had for the recovery of the said principal sum and interest on either said note or
390 mortgage, it shall and may be lawful for the party of the second part, or his successors, to include in the judgment that may be recovered, counsel fees and charges of attorneys and counsel employed in such foreclosure suit in the sum of five hundred dollars in gold coin (or in case of settlement or payment being made after suit has been commenced, and before the final decree has been entered thereon, an attorney's fee of five hundred dollars in gold coin, shall be taxed as part of the costs in such suit), as well as all payments that the said party of the second part, his successors, may be obliged to *to* include in the judgment that may be recovered counsel fees and charges of attorneys and counsel that he make for him or their security by insurance or on account of taxes,

insurance or on account of any taxes, charges, incumbrances or assessments whatsoever on said premises or any part thereof.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

F. M. TULL. [SEAL.]

Signed sealed and delivered in presence of
H. E. HOUGHTON.
W. C. JONES.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

I, Horace E. Houghton, a notary public in and for said county and Territory do hereby certify that on this sixth day of March, *18889* personally appeared before me the within-named F. M. Tull, a widower, known to me to be the person described in and who executed the within mortgage, and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

391 Given under my hand and seal this sixth day of March, 1889.

[L. S.] HORACE E. HOUGHTON,
Notary Public, Wash. Ter.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

I hereby certify that the within instrument was filed for record in the office of the county auditor of said county, on the 8th day of March, 1889, at 11 o'clock a. m. at the request of Hobbs & Tull and recorded on page 410 of Book "W" of Mortgages.

M. D. SMITH,
County Auditor.

392 PLAINTIFFS' EXHIBIT "19."

In Probate Court, Spokane County.

In the Matter of the Guardianship of WILLIAM L. TULL, DORA M. TULL, and ERNEST B. TULL, Minors.

To the Hon. Millard T. Hartson, judge:

The undersigned, guardian of said minors, respectfully reports. That he has received of the estate of said minors the sum of fourteen thousand dollars, proceeds of the sale of a portion of the real estate, under the order of this court, and that he has invested

393 said funds as follows, to wit: Upon the note of F. M. Tull for fourteen thousand dollars dated March 1, 1889, due in five years after date, with interest payable annually at the rate of ten per cent. per annum, the payment of which note is secured by mortgage executed by F. M. Tull upon the following-described real estate situate in Spokane county, Washington Territory, to wit:

Commencing at the northwest corner of block nineteen, (19), in resurvey and addition of the city of Spokane Falls, thence southerly along the east line of Stevens street, ninety $\frac{42}{100}$ feet; thence at right angles eastwardly and par-llel with the south line of Riverside avenue one hundred (100) feet; thence at right angles parallel with the east line of Stevens street northwardly to south line of Riverside avenue; thence west along said south line; that said sum of money so invested is all of the money in my hands belonging to said minors.

Therefore I respectfully petition that said action be confirmed and approved by this court; that the bondsmen be discharged and released from the obligation of the bond of guardian given upon the sale of real estate of said minors.

Dated M'ch 7th, 1889.

P. D. TULL.

Filed Mar. &, 1889.

MILLARD T. HARTSON, *Judge — Clerk.*

394 PLAINTIFFS' EXHIBIT "20."

In Probate Court, Spokane County.

In the Matter of the Guardianship of WILLIAM L. TULL, DORA M. TULL, and ERNEST B. TULL, Minors.

Upon reading and filing the report of P. D. Tull, guardian of said minors, showing that he has invested the proceeds of the sale of real estate of said minors, authorized and directed by this court, in a note executed by F. M. Tull, due in five years, with interest at 10 per cent. per annum, payable annually, secured by mortgage on real estate:

Ordered, that said report be approved and confirmed and that said investment be, and the same is affirmed.

Ordered further, that C. F. Jackson and F. M. Tull, bondsmen of said guardian, upon the said sale of said real estate, be, and they are hereby, discharged and released from their bond, and all further liability to be incurred thereon.

Dated M'ch 7, 1889.

MILLARD T. HARTSON,
Probate Judge.

395 Filed Mar. 7, 1889, and recorded in the records of said court in Book B of Journals, on page 524.

MILLARD T. HARTSON.
Judge and Clerk.

PLAINTIFFS' EXHIBIT "21."

At a meeting of the board of directors of the German Savings and Loan Society, a corporation, held on the fifth day of
396 November, 1889, a resolution of which the following is a copy, was adopted and entered upon its records viz:

That the mortgage bearing date the sixth day of December, 1888, executed to this corporation by Francis M. Tull and recorded in the office of the county clerk in and for the county of Spokane Territory of Washington in Book S of Mortgages at page 518 be released; and that L. Gotting the president of this corporation is hereby authorized to subscribe the name and affix the seal of this corporation to a release of the same.

Attest my hand and seal of the said corporation.

[CORPORATE SEAL.] GEO. TOURNY, *Secretary.*

Know all men by these presents: That the German Savings and Loan Society, the above-named corporation, in conformity with the above resolution of its board of directors does hereby declare that the above mentioned and described mortgage, together with the debt thereby secured, has been fully paid and discharged.

In witness whereof, the said The German Savings and Loan Society has caused its corporate seal to be hereunto affixed by L. Gotting, its president this fifth day of November, 1889.

[CORPORATE SEAL] THE GERMAN SAVINGS AND LOAN SOCIETY,
By L. GOTTING.

STATE OF CALIFORNIA, *City and County of San Francisco,* } ss:

On this sixth day of November 1889 before me, F. O. Wegener, a notary public in and for the said city and county, duly commissioned, personally appeared L. Gotting, known to me to be
397 the president of said corporation that executed the within instrument, and acknowledged to me that said corporation executed the same.

In witness whereof I have hereunto set my hand and official seal, the day and year first above written.

F. O. WEGENER,
Notary Public.

Filed Nov. 11th, 1889—11.50 a. m.
Request of F. M. Hull.

W. D. SMITH, *Auditor.*

398 PLAINTIFFS' EXHIBIT "22."

TERRITORY OF WASHINGTON, *County of Spokane,* } ss:

In the Probate Court in and for said County and Territory.

To the Hon. Millard T. Hartson, judge of said court:

Your petitioner represents that he was heretofore appointed guardian of William L. Tull, Dora M. Tull and Ernest B. Tull, minors, by this court; and heretofore duly qualified as such guardian according to law, as will more fully appear by the records of this court

appointing your petitioner as such guardian and the bond and oath heretofore filed by him, reference whereto is hereby made, and the same is prayed to be considered as if more fully set out herein.

Your petitioner further represents that thereafter, and on, to wit, the 31st of July, 1888, he filed his inventory of all the real and personal property of said minors with the clerk of this court, verified by his oath, as required by law, and the same is now on file in the records of this court and reference whereunto is hereby made.

Your petitioner further represents that said minors have now and have had since your petitioner's appointment no personal property or estate dependent upon the settlement of any estate or the execution of any trust, except the mortgage and an insurance policies hereinafter mentioned and referred to.

Your petitioner further represents that said minors are of the age, respectively, of fourteen, ten and five years, and reside with their father, F. M. Tull, in the city of Spokane, Spokane county, Washington Territory.

399 Your petitioner further represents that said minors own jointly and equally an undivided one-half interest in and to the following-described real estate, and that their father, F. M. Tull, owns the other half thereof, to wit:

That certain real estate described as commencing at a point on the south line of Riverside avenue in the town (now city) of Spokane Falls, in Spokane county, Territory of Washington, one hundred feet easterly from the northwest corner of block nineteen in said city; running thence along said line of said Riverside avenue in an easterly direction fifty, (50), feet; thence at right angles in a southerly direction one hundred eighty, (180), feet, more or less, to the north line of Sprague street, thence at right angles along said line of Sprague street, westerly sixty (60) feet; thence in a northerly direction and parallel with Stevens street in said city, eighty (80), feet; thence in an easterly direction and parallel with the south line of said Riverside avenue, ten (10), feet; thence in a northerly direction and parallel with said Stevens street to the place of beginning.

Your petitioner further represents that prior to the 4th day of August 1889 there had been a large three-story brick building on said property; that on the evening of August 4, 1889 said building was destroyed by fire: that said real estate is incumbered by two mortgages, one for the sum of ten thousand dollars, due November 25, 1889, and bearing interest at the rate of 10 % per annum payable monthly.

The other securing two notes for five thousand dollars each payable to J. N. Glover, June 30, 1889, and bearing interest at the rate of one per cent. per month: the interest on one of said notes being payable quarterly and on the other monthly.

400 That there were insurance policies on said building to an amount sufficient to cover the first of said mortgages, but not sufficient to pay both thereof; that said property cannot be rented without building on said property; that the same is within the fire limits of said city and no building can be erected thereon except of

brick, stone, or iron: that said minors have no means wherewith to erect said building or to pay said mortgage: that said mortgage is now past due and the holders thereof are threatening to foreclose the same unless paid: that the whole of said real estate is of the value of $40,000, of which said minors own one-half as aforesaid: that petitioner, as guardian of said minors, has received as rent on said property and the buildings thereon burned as aforesaid prior to said fire the sum of sixteen hundred dollars: that the only personal property owned by said minors is a mortgage for the sum of fourteen thousand dollars on certain real estate in said city, bearing interest at rate of ten per cent. per annum and due about January, 1894, and a one-half interest in an insurance policy on said burned building for the amount of ten thousand dollars and held by the mortgagee of the first of above-described mortgages and the whole of which will be required to pay off said mortgage.

Your petitioner further alleges that no income can be derived from said real estate and that the same is liable to be sold on foreclosure of the mortgage aforesaid and on account of redemption will not sell for its entire value, but will be sacrificed and the costs thereof will be great: that a better investment of said value of said real estate may be made by selling the same, and investing the proceeds thereof in mortgaged loans upon real estate in the city of Spokane Falls, or in other real estate, as the court may from time to time direct; and by using sufficient thereof to pay off said
401 mortgage to said J. N. Glover.

In view of the premises, your petitioner alleges that it would be for the best interests of and beneficial to said minors to sell their interest in said real estate.

Wherefore, he prays that an order may be made directing notice to be given, as required by law, directing all persons interested to show cause on a day to be fixed by the court, why an order of sale of said real estate should not be made, as required by law, and that on the hearing of this petition and said show-cause order, an order of said sale may be made, as provided by law in such cases.

P. D. TULL,
Guardian of said Minors.

HOUGHTON, GRAVES & JONES, *Att'ys.*

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

P. D. Tull, being first duly sworn, on his oath deposes and says: That he is the guardian named in the foregoing petition of the minors therein named; that he has read the foregoing petition, knows the contents thereof, and that the same, and the matters and things therein alleged are true.

P. D. TULL.

Subscribed and sworn to before me this 12 day of August, 1889.

FRANK W. HOBBS,
[NOTARY SEAL.] *Notary Public.*

402 Filed August 12, 1889.
Recorded in the records of the said court in Book "A" of Petitions on pages 280, 281, 282, Oct. 17, 1889.

MILLARD T. HARTSON,
Judge and ex Officio Clerk.

PLAINTIFFS' EXHIBIT "23."

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

In Probate Court in and for said County and Territory.

In re Guardianship of WILLIAM L. TULL, DORA M. TULL, and ERNEST B. TULL.

On reading the application and petition of P. D. Tull, guardian of said minors, for an order directing and authorizing him to sell the interests of said minors in and to the following-described real estate, to wit:

403 That certain real estate described as commencing at a point on the south line of Riverside avenue in the town (now city), of Spokane Falls, in Spokane county, Washington Territory, one hundred feet easterly from the northwest corner of block nineteen (19), in said city; running thence along said line of said Riverside avenue in an easterly direction fifty (50) feet; thence at right angles in a southerly direction one hundred eighty (180) feet, more or less, to the north line of Sprague street in said city; thence at right angles along said line of Sprague street in a westerly direction sixty (60) feet; thence in a northerly direction, and parallel with Stevens street in said city eighty (80) feet; thence in an easterly direction and parallel with the south line of said Riverside avenue, ten (10) feet; thence in a northerly direction and parallel with said Stevens street to the place of beginning.

It is ordered by the court that all persons interested be and appear before me at my office in court-house in the city of Spokane Falls, Spokane county, Washington Territory, on the 14 day of September, 1889, then and there to show cause, if any they have, why an order should not be granted to said guardian to sell said real estate according to law.

Ordered that a copy of this notice be served on each of said minors and on their father, F. M. Tull, at least ten days before said 14th day of September, 1889.

Dated this 12th day of August, 1889.

MILLARD T. HARTSON,
Probate Judge.

404 TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

Joseph Rosselot, being first duly sworn, says that he is a citizen of the United States, over twenty-one years of age, that at the city of Spokane Falls, in Spokane county, Washington Territory, on the

2nd day of September, 1889, he served a copy of the within order to show cause upon William L. Tull, Dora M. Tull, Ernest B. Tull, the minors therein named, and upon F. M. Tull, father of said minors, by delivering to and leaving with each of them a true copy thereof, and that he knew the persons so by him served to be the same persons named in said order. Deponent further says that he is not in any manner interested in this proceeding.

JOSEPH ROSSELOT.

Subscribed and sworn to before me this third day of October, 1839.

MILLARD T. HARTSON, *Judge.*

Filed Oct. 3, 1889.
M. T. HARTSON,
Judge and ex Officio Clerk.

405 PLAINTIFFS' EXHIBIT "24."

Notice.

STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Probate Court of said County and State.

In the Matter of the Guardianship of WILLIAM L. TULL, DORA M. TULL, and ERNEST B. TULL, Minors.

Notice is hereby given that P. D. Tull, guardian of said minors, has filed in this court a petition praying for confirmation of the sale of a portion of the estate of said minors, and that the 10th day of December, 1889, at the hour of 10 o'clock a. m., of said day, being a day of the regular November 1889 term of said court, at the court-room of said county, in the city of Spokane Falls, in said county, has been set for the hearing of said petition, when and where any person may appear and show cause, if any they have, why the said petition should not be granted.

Dated this 29th day of November, 1889.

MILLARD T. HARTSON,
Judge of Probate and ex Officio Clerk of the Probate Court of Spokane County.

Affidavit of Posting Notice Annexed.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Joseph Rosselot, of said county and State, being duly sworn on his oath swears that he is a citizen of the United States over the age of twenty-one years, and not interested in or party to the estate of the minors named in the notice hereto attached; that on the 30th day of November, 1889, he posted correct and true copies of the

notice hereto attached in three public places in said county
406 one of which was at the place where said court is held, one at the court-house in and for said county; and one on a building at the S. E. corner of Riverside avenue and Bernard street in Spokane Falls said county.

JOSEPH ROSSELOT.

Subscribed and sworn to before me this 10 day of December, 1889.

MILLARD T. HARTSON,
Judge of the Probate Court, Spokane County, Wash.

Filed Dec. 10, 1889.

MILLARD T. HARTSON,
Judge and ex Officio Clerk.

PLAINTIFFS' EXHIBIT "25."

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

F. C. Goodin, being first duly sworn, deposes and says, that he is the manager of the weekly Review newspaper published in Spokane Falls in Spokane county, Washington Territory. That the notice of guardian's sale of real estate, of which a copy is hereto attached, was first published in said newspaper in its issue dated the 4th day of October, 1889, and was published in each issue of said newspaper for three weeks thereafter the full period of four *week-*, the last publication thereof being in the issue dated the 24th day of October, 1889.

F. C. GOODIN.

407 Subscribed and sworn to before me this twenty-sixth day of October, 1899.

EUGENE J. CAISSON,
Notary Public.

408 PLAINTIFFS' EXHIBIT "27."

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

In Probate Court, said County.

In the Matter of the Estate and Guardianship of WILLIAM L. TULL, DORA M. TULL, and ERNEST B. TULL, Minors.

It appearing to the court that said minors have need of a guardian *ad litem* in said matter:

Ordered, that A. J. Shaw be, and he is hereby, appointed guardian *ad litem* of said minors, for the purpose of appearing for and taking care of their interests in this proceeding.

Ordered, further that he appear upon the hearing of the
409 petition of P. D. Tull, guardian of said minors, to sell land for the interest of the estate of said minors, and that he appear

for and take care of their interests, in all subsequent proceedings in said matter.

Done in open court this 14 day of September, 1889.

MILLARD T. HARTSON, *Judge.*

Filed September 14, 1889. Recorded in the records of said court in Book "C" of Journals on page 49, Nov. 14, 1889.

MILLARD T. HARTSON,
Judge and ex Officio Clerk of said Court.

PLAINTIFFS' EXHIBIT "28."

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

In Probate Court in and for said County and Territory.

In re Guardianship of WILLIAM L. TULL, DORA M. TULL, and ERNEST B. TULL, Minors.

The above matter coming on to be heard before me this day, upon the petition of P. D. Tull, guardian of said minors, for leave and direction to sell the following-described real estate of said minors, to wit:

An undivided one-half interest in and to that certain real estate described as commencing at a point on the south line of
410 Riverside avenue, in the town (now city) of Spokane Falls, in Spokane county, Washington Territory, one hundred feet easterly from the northwest corner of block nineteen in said city; running thence along said line of Riverside avenue in an easterly direction fifty feet; thence at right angles, in a southerly direction one hundred eighty (180) feet, more or less, to the north line of Sprague street; thence at right angles along said line of Sprague street westerly sixty (60) feet; thence in a northerly direction and parallel with Stevens street in said city, eighty (80) feet; thence in an easterly direction and parallel with the south line of said Riverside avenue ten (10) feet; thence in a northerly direction and parallel with said Stevens street to place of beginning.

And upon the answer of A. J. Shaw, guardian *ad litem* for said minors and upon the proofs had in open court.

And the court being fully advised in the premises, finds as proven that said minors are the only children of Lucy A. Tull, deceased, and are the sole heirs of said deceased; that said minors own jointly an undivided one-half interest in said real estate, and that their father, F. M. Tull, owns the other one undivided one-half interest therein, and that no other persons have any interest therein.

That all persons interested in said real estate, to wit, said minors and F. M. Tull, were duly served with notice of the time and place of hearing said petition and a copy of the order to show cause heretofore made herein.

The court further finds that all the allegations of said petition are true and that it is necessary to sell said real estate in order to pre-

vent a sacrifice thereof, and that it is for the best interest of said minors that the same be sold and the proceeds thereof invested in first-mortgage loans; and said guardian *ad litem* consent-
411 ing thereto.

It is therefore ordered, adjudged and decreed by the court, that said guardian be, and he hereby is, directed, authorized and decreed to sell said real estate at public auction to the highest bidder for cash, first giving notice of the time and place and terms of said sale, as required by law.

That before such sale he enter into bond in the sum of $40,000 conditioned as provided by law.

Done in open court this 14 day of September, 1889.

MILLARD T. HARTSON, *Judge.*

Filed Sep. 14, 1889. Recorded in the records of said court in Book "C" of Journals, on page 47. Oct. 22, 1889.

MILLARD T. HARTSON,
Judge and ex Officio Clerk of said Court.

412 PLAINTIFFS' EXHIBIT "29."

Bond.

Know all men by these presents, that we, P. D. Tull, as principal and D. B. Fotheringham and F. M. Tull, as sureties, are held and firmly bound unto the Territory of Washington in the penal sum of forty thousand dollars ($40,000) for the payment of which well and truly to be made we bind ourselves our heirs, executors and administrators firmly by these presents.

Witness our hands and seals this 25th day of October, 1889.

The condition of the above obligation is such that whereas the above-bounden, P. D. Tull, guardian of William L. Tull, Dora M. Tull and Ernest B. Tull, has been directed, by order of the probate court in and for Spokane county, Washington Territory, to sell certain real estate belonging to said minors and particularly described in the order therefor made and entered by said court on the 14th day of September, 1889.

Now, therefore, if said guardian shall well and faithfully perform said order and account to said court for the proceeds of said sale in the manner and as provided by law, then this obligation to be void, otherwise to remain in full force and effect.

P. D. TULL. [SEAL.]
F. M. TULL. [SEAL.]
D. B. FOTHERINGHAM. [SEAL.]

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

D. B. Fotheringham and F. M. Tull being first duly sworn, each for himself, and not one for the other, on his oath says: That he is a resident and householder in Spokane county, Washington Territory,

and worth the sum of twenty thousand dollars, over and above all debts liabilities, and exclusive of property exempt from execution.

F. M. TULL.
D. B. FOTHERINGHAM.

Subscribed and sworn to before me this 25th day of Octo-
413 ber, 1889.

MILLARD T. HARTSON, *Judge.*

Filed Oct. 25, 1889. Recorded in the records of said court in Book "A" of Bonds on page 327. March 20th, 1890.

MILLARD T. HARTSON,
Judge and ex Officio Clerk of said Court.

414 PLAINTIFFS' EXHIBIT "30."

STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Probate Court.

In the Matter of the Guardianship of WILLIAM L. TULL, DORA M. TULL, and ERNEST B. TULL, Minors.

To the Honorable Millard T. Hartson, judge of said court:

I, P. D. Tull, guardian of said minors, do hereby certify that by virtue and in pursuance of an order of this court, made by this court and delivered to me on the 14 day of September, 1889, ordering me to sell a portion of the real estate of said minors, as their guardian, to wit: all the right, title, interest and estate of said minors in and to all that certain lot, piece or parcel of land, situate, lying and being in the county of Spokane, and Territory of Washington, to wit: An undivided one-half interest in and to that certain real estate described as commencing at a point on the south line of Riverside avenue in the town (now city) of Spokane Falls, Spokane county, Washington Territory, one hundred (100) feet easterly from the northwest corner of block nineteen (19) in said city; running thence along said line of said Riverside avenue in an easterly direction fifty (50) feet; thence at right angles in a southerly direction one hundred and eighty feet (180), more or less, to the north line of Sprague street, thence at right angles along said line of Sprague street westerly sixty (60) feet; thence in a northerly direction and parallel with Stevens street, in said city, eighty (80) feet; thence in an easterly direction and parallel with the south line of Riverside avenue ten (10) feet; thence in a northerly
415 direction and parallel with said Stevens street to the place of beginning.

I did on the 1st day of October, 1889, cause to be posted in three of the most public places in the county where the land is situated, notices of the time and place of said sale, as will appear by the affidavit hereto attached, marked "A" and made a part of this report, and that I caused a like notice to be published in the Spokane

Falls Weekly Review, a newspaper in said Territory in general circulation in said county for four consecutive weeks next before such sale. in which notice said lands were described with certainty, as will appear by the affidavit of C. F. Goodin marked "B," hereto attached and made a part of this report.

That at the time and place mentioned in said notice, to wit: on the 26th day of October, 1889, at ten (10) o'clock a. m. at the premises described in said notice, in Spokane Falls, Spokane county, Washington, Territory, I offered said described real estate for sale at public action to the highest bidder upon the terms mentioned in said notice of sale, to wit: Terms of sale, cash, and F. M. Tull, having bid therefor the sum of — dollars, I then and there struck off to him, the said F. M. Tull, for the sum of twenty thousand dollars cash, said F. M. Tull being the highest and best bidder and the same being the highest sum bid therefor.

I further report unto your honor that I am not directly or indirectly interested in the purchase of said real estate; that said sale was legally and fairly conducted as to all of its proceedings, and that the sum bid therefor and for which it was struck off and sold was not disproportionate to the value of said real estate, as I verily believe.

Wherefore, I pray that said sale may be by the order of this court confirmed, and that I be directed and authorized to execute and deliver to the purchaser a good and sufficient deed of said
416 premises upon his complying with the terms of said sale.

P. D. TULL, *Guardian.*

STATE OF WASHINGTON, } ss:
County of Spokane, }

P. D. Tull, being first duly sworn, says: That he is guardian of William L. Tull, Dora M. Tull, and Ernest B. Tull, minor heirs of —— Tull, deceased; that he has read the foregoing report; knows the contents thereof, and believes the same to be true.

P. D. TULL.

Subscribed and sworn to before me this 30th day of November, 1889.

W. C. JONES,
Notary Public.

[NOTARY SEAL.]

417 *Notice of Guardian's Sale of Real Estate.*

Notice is hereby given that in pursuance of an order of the probate court of Spokane county, Washington Territory, made on the 14th day of September, 1889, in the matter of the application of P. D. Tull, guardian, for an order to sell the hereinafter described real estate of William L. Tull, Dora M. Tull and Ernest B. Tull minors, and his wards; the undersigned, the guardian of said minors, will sell at public auction to the highest bidder, and subject to the confirmation by said probate court on the 26th day of October, A. D. 1889 at ten o'clock a. m. at the premises in Spokane Falls, Spokane

county, Washington Territory, all the right, title, interest, and estate of the said minors in and to all that certain lot, piece, or parcel of land situate, lying and being in the said county of Spokane, Territory of Washington, more particularly described as follows, to wit: An undivided one-half interest in and to that certain real estate described as commencing at a point on the south line of Riverside avenue in the town (now city) of Spokane Falls, Washington Territory, one hundred (100) feet easterly from the northwest corner of block nineteen (19) in said city, running thence along said line of Riverside avenue in an easterly direction fifty (50) feet; thence at right angles in a southerly direction one hundred eighty (180) feet, more or less, to the north line of Sprague street; thence at right angles along said line of Sprague street westerly sixty (60) feet; thence in a northerly direction and parallel with the south
418 line of said Riverside avenue ten (10) feet; thence in a northerly direction and parallel with said Stevens street to the place of beginning.

Terms and conditions of said sale, cash.

P. D. TULL,
Guardian of said Minors.

419 *Affidavit "A."*

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

In Probate Court in and for said County and Territory.

In the Matter of the Guardianship of W. L. TULL, D. M. TULL, and ERNEST B. TULL.

Joseph Rosselot, being first duly sworn, says that he is a citizen of the U. S., over the age of 21 years, is not in any manner interested in said proceeding and that on the 1st day of October, 1889, he posted a true and exact copy of the within notice of sale at the three following places in Spokane county, to wit:

One copy at office of probate court, one copy at court-house for said Territory, and one copy on building situate on the southeast corner of Riverside avenue and Bernard street, in Spokane Falls, W. T.

JOSEPH ROSSELOT.

Subscribed and sworn to 26th day of October, 1889.
MILLARD T. HARTSON, *Judge.*

Filed Oct. 26, 1889.

MILLARD T. HARTSON,
Judge and ex Officio Clerk.

420 PLAINTIFFS' EXHIBIT "31."

STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Probate Court of said County.

In the Matter of the Guardianship of WILLIAM L. TULL, DORA M. TULL, and ERNEST B. TULL, Minors.

Order Directing the Posting of Notices.

On reading and filing the petition of P. D. Tull, guardian of said minors praying for confirmation of the sale of a portion of the estate of said minors:

It is ordered that the 10th day of December, 1889, at 10 o'clock a. m. of that day, being a day of the regular November 1889 term of said court, at the court-room in the city of Spokane Falls, in said county, be appointed for a day of hearing said petition, and the clerk give notice thereof by causing notices to be posted according to law.

MILLARD T. HARTSON,
Probate Judge.

Done in open court this 29 day of November, 1889.

Filed Nov. 29, 1889, and entered in Journal "C," probate court, Spokane county, State of Washington, at page 97 on the 11 day of December, 1889.

MILLARD T. HARTSON, *Clerk.*

421 PLAINTIFFS' EXHIBIT "32."

STATE OF WASHINGTON, } ss:
County of Spokane, }

In Probate Court.

In the Matter of the Estate of WILLIAM L. TULL, DORA M. TULL, and ERNEST B. TULL, Minors.

At a regular term of the probate court in and for said county and State commenced to be holden upon the 25th day of November, 1889.

Present: The Honorable Millard T. Hartson, judge of said court.

Now, on this day comes P. D. Tull, guardian of said minors and makes his report in writing to this court of his sale upon the 26th day of October, 1889, at the hour of ten o'clock a. m. of said day of the following-described real estate, to wit: Undivided one-half interest in and to that certain real estate described as commencing at a point on the south line of Riverside avenue in the town (now city)

of Spokane Falls, in Spokane county, W. T., one hundred
422 feet (100) easterly from the northwest corner of said Riverside Ave. block nineteen in said city; running thence along said line of Riverside avenue in an easterly direction fifty feet; thence at right angles in a northerly direction one hundred eighty feet more or less to the north line of Sprague street, thence at right angles along said line of Sprague street, westerly sixty feet thence in a northerly direction and parallel with Stevens street in said city eighty feet; thence in an easterly direction and parallel with south line of said Riverside avenue ten feet thence in a northerly direction and parallel with said Stevens street to the place of beginning.

And it appearing from said report, and from other and satisfactory evidence shown to the court in open court; that said sale was legally made and fairly conducted, that the sum bid therefor, to wit, twenty thousand dollars cash was not disproportionate to the value of said property; that due, proper and legal notice thereof had been given by the posting of notices in three of the most public places of the county, and by publication, as required by law, in the Spokane Weekly Review, a weekly newspaper of general circulation published once a week at Spokane Falls in said county and State.

It is therefore ordered, adjudged and decreed by the court that said sale be, and the same hereby is ratified and confirmed, and the said P. D. Tull, guardian as aforesaid, is hereby directed to make conveyance of said property to the purchaser thereof, F. M. Tull, upon his complying with the terms and conditions of said sale.

Done in open court this 10th day of December, 1889.

MILLARD T. HARTSON, *Judge.*

423 Filed Dec. 10th, 1889.

Recorded in the records of said court in Book "C" of Journals on page 128.

April 3, 1890.

MILLARD T. HARTSON,
Judge and ex Officio Clerk of said Court.

424 PLAINTIFFS' EXHIBIT "33."

Guardian's Deed.

P. D. Tull
to
F. M. Tull.

Filed Dec. 11th, 1889, 9 a. m., request D. M. Thompson. Recorded Jan. 29, '90. M. D. Smith, auditor, by Carrie Davis, deputy.

This indenture made the tenth day of December, A. D. one thousand eight hundred and eighty-nine by and between P. D. Tull the duly appointed, qualified, and acting guardian of William L. Tull, Dora M. Tull and Ernest B. Tull, minors, the party of the first part,

and F. M. Tull, of Spokane Falls, Washington, party of the second part.

Witnesseth—that whereas on the fourteenth day of September 1889 the probate court of the county of Spokane, the Territory of Washington, made an order of sale authorizing the said party of the first part to sell certain real estate of the said minors situate in the city of Spokane, Spokane county, Washington Territory and specified and particularly described in said order of sale on record in the office of said probate court, and which original order is hereby referred to and hereby made a part hereof, and whereas under and by virtue of said order of sale and pursuant to legal notices given thereof, the said party of the first part on the 26th day of October, 1889, at the premises in the said city, county and Territory at the hour of ten o'clock in the forenoon of said day offered for sale at public auction the real estate situate in said city and county and specified and described in said order of sale as aforesaid and at such sale the said party of the second part became the purchaser of the whole of the real estate hereinafter particularly described and described in said order of sale for the sum of twenty thousand (20,000) dollars, he being the highest and best bidder, and
425 that being the highest and best sum bid.

And whereas the said probate court upon the due and legal return of his proceedings, under the said order of sale, made by the party of the first part on the 30th day of November, 1889, after the making of said sale, did on the 10th day of December, 1889, at the next term of said court after the making of said return and sale make an order confirming said sale and directing a conveyance to be executed to the party of the second part, which order of confirmation and direction of conveyance is now on file and of record in said probate court, and is hereby referred to and made a part hereof.

Now therefore the said P. D. Tull, the guardian of the persons and estates of said William L. Tull, Dora M. Tull, and Ernest B. Tull, minors as aforesaid, the party of the first part, pursuant to said order of the said probate court for and in consideration of the sum of twenty thousand (20,000) dollars the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns forever, all the right, title, interest and estate of the said William L. Tull, Dora M. Tull and Ernest B. Tull, minors, in and to all that certain lot, piece or parcel of land situate, lying and being in the county of Spokane and State of Washington, more particularly described as follows, to wit:

Undivided one-half interest in and to the following, to wit: Commencing at a point on the south line of Riverside avenue in the town (now city) of Spokane Falls in Spokane county, State of Washington, one hundred (100) feet easterly from the northwest corner of block nineteen (19) in said city; running thence along said line of said Riverside avenue in an easterly direction fifty (50) feet;
426 thence at right angles in a southerly direction one hundred eighty feet (180) more or less; to the north line of Sprague

street; thence at right angles along said line of Sprague street westerly sixty (60) feet; thence in a northerly direction and parallel with Stevens street in said city eighty (80) feet; thence in an easterly direction and parallel with the south line of Riverside avenue ten (10) feet; thence in a northerly direction and parallel with said Stevens street to the place of beginning.

To have and to hold all and singular the above mentioned and described premises together with all the appurtenances unto the said second party his heirs and assigns forever.

In witness whereof the said first party guardian as aforesaid has hereto set his hand and seal the day and year first above written.

P. D. TULL, [SEAL.]
Guardian of the Persons and Estates of
William F. Tull, Dora M. Tull, and Ernest B. Tull.

Signed, sealed and delivered in presence of—
JOSEPH ROSSELOT.
F. H. GRAVES.

STATE OF WASHINGTON, } ss:
County of Spokane, }

This certifies that on the 10th day of December, 1889, before me the undersigned, a notary public in and for said county and State personally appeared P. D. Tull to me personally known to be the person who signed the within instrument as the guardian of the estates and persons of William F. Tull, Dora M. Tull and Ernest B. Tull, and acknowledged that he signed and sealed the same as guardian of the estates and persons of William L. Tull, Dora M. Tull and Ernest B. Tull, minors freely and voluntarily for the uses and purposes therein mentioned.

427 Given under my hand and official seal on the day and year in this certificate first written.

CHESTER GLASS,
[SEAL.] *Notary Public for Washington.*

STATE OF WASHINGTON, } ss:
County of Spokane. }

—, W. P. Grubbe, auditor in and for Spokane county, Washington, do hereby certify that the above and foregoing instrument is a full, true and correct copy of deed — P. D. Tull, guardian to F. M. Tull, which was filed for record in my office on the 11 day of Dec. 1889, at 11 o'clock a. m., as appears from said original B'k 22 Deeds, pg. 6.

In witness whereof, I have hereunto set my hand and affixed my official seal, at the city of Spokane, this 16th day of September, 1899.

W. P. GRUBBE,
Auditor of Spokane Co., Washington,
By PHIL T. BECHER, *Deputy.*
I. T. R.

428 PLAINTIFFS' EXHIBIT "34."

Pacific Postal Telegraph-Cable Company.

Po 7 O R 24 paid.
Received at San Francisco 8.55 a. m.

PORTLAND, OGN., *Aug. 27th*, 1889.

German Savings & Loan Society, No. 526 Cala. St., San Fran.

Tull's estimate for building is ninety thousand instead of seventy-five, he wants fifty thousand loan instead of forty. I recommend it be granted.

B. GOLDSMITH.

Accepted Aug. 31 / 89 for $50000.

Application for Loan on City Real Estate.

SPOKANE FALLS, *Aug.* 20, 1889.

To the board of directors of the German Savings and Loan Society, San Francisco, Cal.

GENTLEMEN: I desire to borrow of the German Savings and Loan Society, of San Francisco, Cal., the sum of forty thousand dollars ($40,000) in gold coin, repayable in like gold coin, in 3 years, with interest thereon in like gold coin from date of loan, until paid, at the rate of 7½ per cent. per annum, said interest to be paid quarterly and I offer the following real estate as security therefor, viz: all of lots 1 & a portion of lot 2 in block 19 situated and being in city of Spokane Falls county of Spokane, Ty. of Washington, and bounded as follows, viz: being on the S. E. corner of Riverside & Stevens str- & being 100 feet on south side of Riverside avenue & 100 feet on east side of Stevens street.

429 The improvements on said lots will consist of a five-story-and-basement brick building of the value of $75000 and are to be kept insured by me during the continuance of this loan, to the amount of forty thousand dollars, loss, if any, payable to the German Savings and Loan Society, and I agree to pay all the taxes on said property and all the taxes assessed against the mortgage to be executed by me and in your favor for the amount of said loan, and I agree to deposit with you annually the tax receipts for all the taxes paid by me as above mentioned. Said premises will be occupied by tenants

For stores, offices & rooms.
Value of lots $100,000.
Value of improvements $75000.
Assessed at —.
The rental value will be about 25000 doll. per year.
The title is vested in me.

I am the owner of the above-described premises and in the actual possession of the same, that my title and possession have never been questioned, that there is no judgment against me in any of the

courts of record in said county or in the United States court, that I do not owe any money to mechanics, builders or materialmen for work done or material furnished for improvements on the above-described premises, and that there are no other incumbrances on said property except $40,000 to you which will be paid by the insurance Co's.

And for the purpose of procuring said loan I declare the above statements to be true.

Dated Spokane Falls this 20 day of August 1889.

F. M. TULL.

480 *Surveyor's Report.*

I value the within property as follows:

100 x 100 on S. E. corner of Riverside & Stevens Str.....	$100,000
Improvements to cost.....	75,000
Total.....	175,000

The way property sells here now this property would readily sell for $100,000 & more. The building will cost 75000 doll. The applicant sold another piece of property & the money realized from it he will put in the building in addition to what he borrows from us. We have now a loan of forty thousand doll. on this property which will be paid off by the insurance. The loan is wanted as a building loan & I recommend the acceptance of it. When the insurance of forty thousand is paid to us & the interest due we better cancel the old mortgage & have a new one made for this loan if accepted.

Spokane Falls Aug. 20th 1889.

B. GOLDSMITH.

Endorsed on back: Loan No. 9895. Application of F. M. Tull. Spokane W. T. $50000. Accepted Aug. 31 '89.

431 PLAINTIFFS' EXHIBIT "35."

This indenture of mortgage, made and entered into this 26th day of October, 1889, by and between F. M. Tull (unmarried) of the city of Spokane Falls, Spokane county, Territory of Washington, party of the first part, and the German Savings and Loan Society, a corporation duly incorporated under the laws of the State of California, with its principal office in the city of San Francisco, State of California, party of the second part.

Witnesseth: That said party of the first part, for and in consideration of the sum of fifty thousand ($50,000) dollars, gold coin of the United States, to him paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents, does grant, bargain, sell and convey, unto the said party of the second part, its successors and assigns, those certain premises situated in the county of Spokane and Territory of Washington and described as follows, to wit:

Beginning at the northwest corner of block nineteen (19) of the city of Spokane Falls, according to the resurvey and addition thereto, and running thence south along the east line of Stevens street ninety-nine and forty-two one-hundredths (99.42) feet; thence at right angles in an easterly direction parallel with the south line of Riverside avenue for one hundred (100) feet; thence at right angles parallel with the east line of Stevens street in a northerly direction to Riverside avenue; thence westerly along Riverside avenue to the place of beginning—together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

To have and to hold the said described premises unto the said party of the second part, its successors and assigns, for its own use, benefit and behoof forever, the said party of the first part
432 hereby covenanting to and with the said party of the second part, its successors and assigns, that he is lawfully seized of said premises, and now has a valid and unencumbered fee-simple title thereto, and that he will, and his heirs, executors, and administrators shall forever warrant and defend the same against all lawful claims and demands.

The condition of the foregoing conveyance is such, that whereas the said party of the first part has executed to the said party of the second part his promissory note, which is in substance as follows:

$50,000. SPOKANE FALLS, W. T., *October 26th*, 1889.

On the 26th day of October, 1892, without grace, for value received, in gold coin of the United States, I, F. M. Tull, promise to pay to the German Savings and Loan Society, or order, at its office in the city and county of San Francisco, State of California, the sum of fifty thousand ($50,000) dollars, in gold coin of the United States, with interest thereon from date, until paid, at the rate of 7½ per cent. per annum, said interest payable quarterly in like gold coin, and if not paid as it becomes due, is to be added to the principal sum, and become a part thereof, and thereafter is to bear interest at the same rate. And in case said quarterly interest, or any part thereof, is not paid ten days after the same becomes due and payable, then the whole of said principal sum and interest shall forthwith become due and payable, at the election of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay, in addition to the costs and disbursements provided by statute such sum as the court may adjudge reasonable as attorneys' fees in said suit or action. And I further prom-
433 ise to pay, on or before the first day of March in each year at said office in San Francisco, the taxes assessed in Washington Territory upon the mortgage of even date herewith given to secure this note and the debt thereby secured.

(Signed) F. M. TULL.

And whereas, the said party of the first part has covenanted and agreed, and does hereby covenant and agree, to pay all said sums of money, the principal and interest specified in said note, at the times

therein designated, and to keep up and maintain in all manner, the improvements on said premises, and to pay all taxes, assessments and encumbrances of every kind which may by law become due and payable on said premises, and also all taxes which may be levied or imposed on this mortgage, or the moneys thereby secured, and at their own expense, to keep insured against loss by fire to the extent of not less than fifty thousand dollars, the present buildings, or any which may hereafter be erected on said premises during the existence of this debt, in such company as the party of the second part, its successors or assigns, may elect, with loss, if any, under such insurance payable to said party of the second part, its successors or assigns, and to deliver the policies and renewals thereof to the said party of the second part promptly after the issue thereof; and also that the party of the first part will not commit or suffer waste upon said premises, and that he will not cut, or permit to be cut, any of the timber upon said premises, except such as may be necessary for ordinary family use and to keep the said premises in a reasonable state of repair.

Now therefore, if the said party of the first part shall pay said promissory note in accordance with the terms thereof, both principal and interest, and all taxes, assessments, insurance, and all other encumbrances, in accordance with the terms of this
434 mortgage, and shall fully satisfy and comply with the covenants hereinbefore set forth, then this conveyance to be void and of none effect; but otherwise to remain in full force and virtue as a mortgage to secure the payment of said promissory note in accordance with the terms thereof, and a performance of the conditions and agreements herein contained, and as such to be subject to foreclosure; it being agreed that any failure to make any of the payments provided for in said note or this mortgage, for a period of ten days after the same shall become due and payable, or to perform any agreement herein contained, shall give to the party of the second part, its successors or assigns, the option to declare the whole amount due on said note, or unpaid thereon, or on this mortgage, at once due and payable; and that if the said party of the first part shall fail to pay the taxes, assessments, insurance or other encumbrances, as herein provided to be done, the party of the second part, its successors or assigns, shall have the option to pay the same, and the payment so made shall be added to and become part of the amount secured by this mortgage, and draw interest at the rate of ten per cent. per annum, payable annually, without waiver, however, of any rights arising from breach of any of the covenants herein.

It is further expressly agreed:

1st. That in case of filing a bill to foreclose this mortgage, the court may, on the motion of the party of the second part, its successors or assigns, appoint a receiver to collect the rents and profits arising out of said premises during pendency of such foreclosure, and until the right of redemption expires, and such rents and profits shall be applied *pro tanto* of the amount due under this mortgage.

2nd. In the event of this mortgage being foreclosed, the said party

of the first part shall pay such sum as the court may adjudge
435 reasonable as attorneys' fees in said suit, and subject to this mortgage, the same shall be a lien upon said described premises; which said fee shall be due when suit is begun and shall be recovered whether final decree be entered or not and as a part of the commencement of said suit.

In witness whereof, the said party of the first part has hereunto set his hand and affixed his seal this the day and year first above written.

F. M. TULL.

Signed, sealed and delivered in the presence of us as witnesses:
J. M. KINNAIRD.
C. H. WOLF.

TERRITORY OF WASHINGTON, } ss:
Spokane County, }

Be it remembered, that on this 26th day of October, 1889, before me, the undersigned, a notary public within and for the said county and Territory personally appeared the within-named F. M. Tull (unmarried) personally known to me to be the individual described in, and who executed the within instrument, and to me acknowledged that he executed the same for the purposes herein mentioned.

In witness whereof, I have hereunto set my hand and notarial seal, the day and year first above written.

J. M. KINNAIRD,
Notary Public for Washington.

[Notarial Seal of J. M. Kinnaird.]

I certify that the within instrument of writing was received for record on the 28 day of Oct. at 11 o'clock a. m., 1889, and recorded on page 456 in Book W Record of Mortgages of this county, Nov. 23, 1889, by

I. O'NEILL, *Deputy.*
M. D. SMITH.

Req. of J. M. Kinnaird.

436 PLAINTIFFS' EXHIBIT "36."

Release of Mortgage.

Know all men by these presents:—That I, P. D. Tull, as guardian of W. L. Tull, Dora May Tull and Ernest B. Tull, minors do hereby certify that a certain mortgage bearing date March 1st, 1889, made and executed by F. M. Tull, party of the first part therein, for the sum of fourteen thousand dollars, secured upon the following-described real estate situated in Spokane county:

Commencing at the northwest corner of block nineteen (19) in resurvey and addition to Spokane Falls; thence southerly along the east line of Stevens street ninety-nine $\frac{42}{100}$ feet; thence at right angles easterly and parallel with the south line of Riverside avenue

one hundred feet; thence at right angles parallel with the east line of Stevens street northwardly to south of Riverside avenue; thence
437 west along said south line of Riverside avenue to place of beginning, and recorded in the office of the auditor of Spokane county, Washington Ter. in Book "U" of Mortgages of said county on page 410, on the 23 day of March, 1889, together with the *debt thereby secured*, is fully paid and discharged.

In witness whereof I have hereunto set my hand and seal this 7th day of September, 1889.

P. D. TULL. [SEAL.]

Witness:
H. E. HOUGHTON.
W. C. JONES.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

This certifies that on this 7th day of September, 1889, before me, the undersigned, a notary public in and for said county and Territory, personally appeared the within-named P. D. Tull, guardian of Dora M. Tull, Ernest B. Tull, and Wm. L. Tull, minors, personally known to me to be the individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same, as guardian of said minors, as his free and voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

[SEAL.] W. C. JONES,
Notary Public.

Filed September 11, 1889, 10.50 a. m.
Request of Tull & Hobbs.
Recorded September 18th, 1889.

M. D. SMITH, *Auditor,*
By L. WILSON, *Deputy.*

438 STATE OF WASHINGTON, } ss:
County of Spokane, }

I, W. P. Grubbe, auditor in and for Spokane county, Washington, do hereby certify that the above and foregoing instrument is a full, true and correct copy of release of mortgage P. D. Tull to F. M. Tull, Mtgs. 6, page 11, which was filed for record in my office on the 11th day of September, 1889, at 10.50 o'clock a. m. as appears from said original.

In witness whereof I have hereunto set my hand and affixed my official seal at the city of Spokane, this 16th day of September, 1898.

W. P. GRUBBE, *Auditor,*
By PHIL T. BECHER, *Deputy.*

I. T. R. S.

439 PLAINTIFFS' EXHIBIT "37."

Office of Tull & Hobbs, real-estate dealers and financial agents, 14 East Riverside Ave.

SPOKANE FALLS, WASH. TER., *Nov.* 22, 1889.

Mr. B. Goldsmith & Co.

GENTS: Enclosed you will find the application you sent me filled out the best I could. If it is not right, you can fill out any omission. I expect to build the building five story-s high next year to correspond with the one I am completing now I have put in steam-heating large enough to heat this part when done I have put in iron front and joist heavy enough to go four story-s more without interfering with the lower story.

Yours, F. M. TULL.

Accepted Nov. 29, 1889.

Application for Loan on City Real Estate.

PORTLAND, OREGON, *Nov.* 25, 1889.

To the board of directors of the German Savings and Loan Society, San Francisco, Cal.

GENTLEMEN: I desire to borrow of the German Savings and Loan Society, of San Francisco, Cal., the sum of twenty-five
440 thousand dollars ($25,000) in gold coin, payable in like gold coin in three years, with interest thereon in like gold coin from date of loan, until paid, at the rate of 7½ per cent. per annum, said interest to be payable quarterly and I offer the following real estate as security therefor, viz: all the lots being part of 3 & 4 in block 19 situated and being in the city of Spokane Falls, county of Spokane, State of Wash., and bounded as follows, namely: Being fifty feet on south side of Riverside avenue by 100 feet between Stevens & Washington streets. The improvements on said lot consist of a one-story brick, finished, and occupied by a large crockery store and jewelry & drug store, 50 x 95 feet, finished and built heavy enough to build four story-s higher. The walls on one side is 5 story-s high and three story-s on the other of the value of $20,000 and are to be kept insured by F. M. Tull during the continuance of this loan, to the amount of twenty thousand dollars, loss if any, payable to the German Savings and Loan Society, and I agree to pay all the taxes on said property and all the taxes assessed against the mortgage to be executed by me in your favor for the amount of said loan, and I agree to deposit with you annually the receipts for all the taxes paid by me as above mentioned. Said premises are to be occupied by crockery store and jewelry store and drug.

For 66.

Value of lot fifty thousand dollars.

Value of improvements twenty thousand dollars.

Assessed at 25,000 *thousand* dollars.

The rental value is six thousand dollars per annum.

The title is vested in F. M. Tull.

I am the owner of the above-described premises and in actual possession of the same, that my title and possession have never been questioned, that there is no judgment against F. M. Tull in any of the courts of record in said county or in the United States
441 court, that I do not owe any money to mechanics, builders or materialmen for work done or material furnished for improvements on the above-described premises, and that there are no other incumbrances on said property except —

And for the purpose of procuring said loan I declare the above statements to be true.

Dated Spokane Falls this 22nd day of Nov. 1889.

F. M. TULL.

Surveyor's Report.

The property in the within application is well located. It is next to the building of Mr. Tull on which we have a mortgage now.

I value the lot 50 x 100 at	$40,000
Improvements upon it	20,000
Total	60,000

I consider the security ample for a loan of 25,000 dollars & recommend the acceptance of it. The applicant intends to add four stories more to this building in the spring as you will see by enclosed letter to me. Tull is a responsible man & will have a large income from his property.

Portland, Nov. 25th, 1889.

B. GOLDSMITH.

Endorsed on back: Application of F. M. Tull. Spokane Falls. $25,000. Accepted Nov. 29, 1889.

442 PLAINTIFFS' EXHIBIT "38."

This indenture of mortgage, made and entered into this thirtieth day of December, A. D. 1889, by and between F. M. Tull (unmarried) of the city of Spokane Falls, county of Spokane, State of Washington, party of the first part, and the German Savings and Loan Society, a corporation duly incorporated under the laws of the State of California, with its principal office in the city of San Francisco, State of California, party of the second part.

Witnesseth: That said party of the first part, for and in consideration of the sum of twenty-five thousand ($25,000) dollars, gold coin of the United States, to him paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents, does grant, bargain, sell and convey, unto the said party of the second part, its successors and assigns, those certain premises situated in the county of Spokane, and State of Washington, and described as follows, to wit:

Beginning on the south line of Riverside avenue in the city of Spokane Falls one hundred (100) feet east of the northwest corner of block nineteen (19) of the city of Spokane Falls, and running thence south parallel with the west line of block nineteen (19) one hundred (100) feet; thence east parallel with the north line of said block (19) fifty (50) feet; thence north one hundred (100) feet to the south line of Riverside avenue; thence west on said south line to the place of beginning in the county and State as aforesaid together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the said described premises unto the said party of the second part, its successors and assigns, for its own use, benefit and behoof forever, the said party of the first part hereby covenanting to and with the said party of the second part, its successors and assigns, that he is lawfully seized of said premises, and now has a valid and unincumbered fee-simple title thereto,
443 and that he will, and his heirs, executors, and administrators shall forever warrant and defend the same against all lawful claims and demands.

The condition of the foregoing conveyance is such, that whereas the said party of the first part has executed to the party of the second part his promissory note, which is in substance as follows:

$25,000. SPOKANE FALLS,
WASHINGTON, *December 30th*, 1889.

On the 30th day of December, 1892, without grace, for value received, in gold coin of the United States, I, F. M. Tull promise to pay to the German Savings and Loan Society, or order, at its office in the city and county of San Francisco, State of California, the sum of twenty-five thousand ($25,000) dollars, in gold coin of the United States, with interest thereon from date, until paid, at the rate of 7½ per cent. per annum, said interest payable quarterly in like gold coin, and if not paid as it becomes due, it is to be added to the principal sum, and become a part thereof, and thereafter is to bear interest at the same rate. And in case said quarterly interest, or any part thereof, is not paid within ten days after the same shall become due and payable, then the whole of said principal and interest shall forthwith become due and payable, at the election of the holder of this note. And in case suit or action is instituted to collect this note, or any part thereof, I promise to pay, in addition to the costs and disbursements provided by statute, such sum as the court may adjudge reasonable as attorneys' fees in said suit or action. And I further promise to pay, on or before the first day of March in each year at said office in San Francisco, the taxes assessed in Washington upon the mortgage of even date herewith, given to secure this note and the debt thereby secured.

(Signed) F. M. TULL.

444 And whereas, the said party of the first part has covenanted and agreed, and does hereby covenant and agree, to pay all sums of money, the principal and interest specified in said note, at

the times therein designated, and to keep up and maintain in all manner, the improvements on said premises, and to pay all taxes, assessments and encumbrances of every kind which may by law become due and payable on said premises, and also all taxes which may be levied or imposed on this mortgage or the moneys thereby secured, and at his own expense, to keep insured against loss by fire to the extent of not less than twenty-five thousand ($25,000) dollars, the present buildings, or any which may hereafter be erected on said premises during the existence of this debt, in such company as the party of the second part, its successors or assigns, may elect, with loss, if any, under such insurance, payable to said party of the second part, its successors or assigns, and to deliver the policies and renewals thereof to the said party of the second part promptly after the issue thereof; and also that the said party of the first part will not commit or suffer waste upon said premises, and that he will not cut, or permit to be cut, any of the timber upon said premises, except such as may be necessary for ordinary family use and to keep the said premises in a reasonable state of repair.

Now therefore, if the said party of the first part shall pay said promissory note in accordance with the terms thereof, both principal and interest and all taxes, assessments, insurance, and all other encumbrances, in accordance with the terms of this mortgage, and shall fully satisfy and comply with the terms of this mortgage and the covenants hereinbefore set out, then this conveyance to be void and of none effect; but otherwise to remain in full force and virtue as a mortgage to secure the payment of said promissory note in accordance with the terms thereof, and a performance of the conditions and agreements herein contained, and as such to be
445 subject to foreclosure; it being agreed that any failure to make any of the payments provided for in said note or this mortgage, for a period of ten days after the same shall become due and payable, or to perform any of the agreements herein contained, shall give to the party of the second part, its successors and assigns, the option to declare the whole amount due on said note or unpaid thereon, or on this mortgage, at once due and payable; and if the said party of the first part shall fail to pay the taxes, assessments, insurance or other encumbrances, as herein provided to be done, the party of the second part, its successors or assigns, shall have the option to pay the same, and the payment so made shall be added to and become part of the amount secured by this mortgage, and draw interest at the rate of ten per cent. per annum, payable annually, without waiver, however, of any rights arising from the breach of any of the covenants herein.

It is further agreed:

1st. That in case of filing a bill to foreclose this mortgage, the court may, on the motion of the party of the second part, its successors or assigns, appoint a receiver to collect the rents and profits arising out of said premises during pendency of such foreclosure, and until the right of redemption expires, and such rents and profits shall be applied in payment *pro tanto* of the amount due under this mortgage.

2nd. In the event of this mortgage being foreclosed, the party of the first part shall pay such sum as the court may adjudge reasonable as attorneys' fees in said suit, and subject to this mortgage, the same shall be a lien upon said described real estate; which said fee shall be due when suit is begun and shall be recovered whether final decree be entered or not and as a part of the costs of the commencement of this suit.

In witness whereof, the said party of the first part has
446 hereunto set his — and affixed his seal the day and year first above written.

F. M. TULL. [L. S.]

Signed, sealed and delivered in the presence of us as witnesses:
J. M. KINNAIRD.
F. K. McBROOM.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Be it remembered, that on this thirtieth day of December, 1889, before me, the undersigned, a notary public within and for the said county and State, personally appeared the within-named F. M. Tull (widower) personally known to me to be the individual described in, and who executed the within instrument, and acknowledged that he executed the same for the purposes therein mentioned.

In witness whereof, I have hereunto set my hand and seal, the day and year above written.

F. K. McBROOM,
[NOTARIAL SEAL.] *Notary Public for Washington.*

I certify that the within instrument of writing was received for record on the 30th day of Dec. at 3 o'clock p. m., 1889, and recorded on page 337 in Book 10, Feb. 3, 1890.

M. D. SMITH,
County Clerk for said County,
By D. S. PRESCOTT,
Deputy Clerk.

447 PLAINTIFFS' EXHIBIT "39."

Mortgage.

This indenture, made this 31st day of December, in the year of our Lord one thousand eight hundred and eighty-nine, between F. M. Tull, the party of the first part, and P. D. Tull, guardian of Dora M. Tull, Ernest B. Tull and William L. Tull, the party of the second part,

Witnesseth, that the said party of the first part, for and in consideration of the sum of thirty-four thousand dollars, gold coin of the United States, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to his successors and assigns, the fol-

lowing-described tracts or parcels of land lying and being in the county of Spokane and State of Washington, and particularly described as follows, to wit:

Commencing at the northwest corner of block nineteen, (19), in the city of Spokane Falls, and running thence east on the south line of Stevens street, 99½ feet; thence west parallel with the
448 south line of Riverside avenue one hundred feet to the east line of Stevens street; thence north on said east line of Stevens street to place of beginning, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging.

This conveyance is intended as a mortgage to secure the payment of thirty-four thousand dollars, gold coin of the United States, at the rate of ten per cent. per annum from date until paid, according to the terms and conditions of one certain promissory note, bearing even date herewith, made by said M. F. Tull to said P. D. Tull, as guardian, as aforesaid, five years from date; and these presents shall be void if such payment be made according to the terms and conditions thereof; but in case default be made in the payment of the principal or interest of said promissory note, or any part thereof, when the same shall become due and payable, according to the terms and conditions thereof, then said party of the second part, his executors, administrators, successors and assigns are hereby empowered to sell the said premises, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the whole of said principal and interest whether the same shall be then due or not, together with the costs and charges of making such sale and the overplus, if any there be, shall be paid to the party making such sale, on demand, to the said party of the first part, his heirs or assigns; and in any suit or other proceedings that may be had for the recovery of said principal sum, and interest on either said note or this mortgage, it shall and may be lawful for the said party of the second part, his heirs, executors, administrators or assigns, to include in the judgment that may be recovered counsel fees and charges of attorneys and counsel employed in such forclosure suit, the sum of one thousand dollars, in gold coin; or in case
449 of settlement or payment being made after suit has been commenced, and before the final decree has been entered thereon, an attorney's fee of five hundred dollars, in gold coin, shall be taxed as part of the costs in such suit, as well as all payments that the said party of the second part, his heirs, executors, administrators or assigns, may be obliged to make for his or their security by insurance or on account of any taxes, charges, encumbrances or assessments whatsoever on said premises, or any part thereof.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) F. M. TULL. [SEAL.]

Signed, sealed and delivered in presence of—
F. H. GROMEZ. (?)
W. C. JONES.

STATE OF WASHINGTON, } ss:
County of Spokane, }

This is to certify that on this 31st day of December one thousand eight hundred and eighty-nine, before me the undersigned, notary public in and for the State of Washington, duly commissioned and sworn, personally came F. M. Tull to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal, the day and year in this certificate first above written.

(Signed) W. C. JONES,
Notary Public in and for Washington Territory.

450 Filed Jan. 4" 1890 at 10.29 a. m. Request of P. D. Tull.
M. D. SMITH, *Auditor,*
By C. E. BUTLER, *Deputy.*

Recorded Jan'y 30 1890 Book 5 page 435.

STATE OF WASHINGTON, } ss:
County of Spokane, }

I, W. P. Grubbe auditor in and for Spokane county, Washington, do hereby certify that the above and foregoing instrument is a full true and correct copy of mtge. & marginal release, F. M. Tull to P. D. Tull guardian which was filed for record in my office on the 4th day of Jan'y 1890 at 10.29 o'clock a. m. as appears from said original. Mtgs. 5 pg. 435.

In witness whereof, I have hereunto set my hand and affixed my official seal at the city of Spokane, this 16 day of Sept. 1898.

W. P. GRUBBE,
[SEAL.] *Auditor of Spokane Co.,*
By PHIL T. BECKER, *Deputy.*

I. T. R. S.

451 This mortgage and note secured thereby fully paid, satisfied and discharged this 7th day of April, 1892.

P. D. TULL, [SEAL.]
For the Heirs.

Attest:
J. J. L. PEEL, *Auditor,*
By W. H. HOSLER, *Deputy.*

Book 5, page 435.

452 PLAINTIFFS' EXHIBIT "40."

Application for Loan on Real Estate.

PORTLAND, OREGON, —— —, 189–.

To the board of directors of the German Savings and Loan Society, San Francisco, Cal.

GENTLEMEN: I desire to borrow of the German Savings and Loan Society, of San Francisco, Cal., the sum of twenty thousand dollars ($20,000) in gold coin, repayable in like gold coin in three years, with privilege — with interest thereon in like gold coin from date of loan, until paid, at the rate of 7 per cent. per annum, said interest to be payable quarterly and I offer the following real estate as security therefor, viz: all the — lot — in block 19 and bounded as follows, namely: W. ½ lot 3 bl'k 19 E. ½ & N. 99.38 of W. ½ 4 bl'k 19 N. 99.38 lot 5 bl'k 19 resurvey addition. The above being the property on which we have now a mortgage. Also the E. ½ of lot 3 & the W. ½ of lot 4 in block 19 being sixty feet on north side of Sprague street by 80 deep situated and being in the city of Spokane Falls county of Spokane, State of Washington.

The improvements on said lot will consist of three-story brick building and are to be kept insured by me during the continuance of this loan, to the amount of ten thousand dollars, loss, if any, payable to the German Savings and Loan Society, and I agree to pay all the taxes on said property and all the taxes assessed against the mortgage to be executed and in your favor for the amount of said loan, and if requested I agree to deposit with you annually
453 the tax receipts for all the taxes paid by — as above mentioned.

Said premises are occupied by — for —. Value of lot 30,000 Value of improvements 10,000. Rental value — per month. Assessed at —. The title is vested in me.

I am the owner of the above-described premises and in actual possession of the same, that my title has never been questioned, that there is no judgment against me in any of the courts of record in said county, or in the United States court, that I do not owe any money to mechanics, builders, or materialmen for work done or material furnished for improvements on the above-described premises, and that there are no encumbrances on said property except — and for the purpose of procuring said load I declare the above statements to be true.

Dated 10th day of March, 1889.

(Signed) F. M. TULL.

Surveyor's Report.

Valuation of lot 60 x 80 on Sprague St.....	$30,000
Improvements, to cost.....	10,000
Total.....	$40,000

The applicant will want ten thousand dollars when loan is completed & the balance of the loan as the building progresses. He first made application for a loan of twenty thousand dollars on the 60 x 80 ft. lot on Sprague street, ten thousand of which to be put into the building on the lot, but as the amount of the loan
454 exceeded the 40% limit on the valuation I suggested to the applicant to give us a mortgage for twenty thousand dollars covering the property on which we have a mortgage of one hundred thousand dollars now & on the above-mentioned 60 x 80 on Sprague street. This he is willing to do and I recommend the acceptance of the loan on the above conditions.

Portland, April 14 93.

(Signed) B. GOLDSMITH.

Declined, Apr 18 1893.

455 PLAINTIFFS' EXHIBIT "41."

At a regular meeting of the board of directors of the German Savings & Loan Society, a corporation duly incorporated under the laws of the State of California, held on the 13th day of May, 1892, a resolution, of which the following is a copy, was duly adopted by a majority *the* vote of the members of said board and entered upon its records, viz:

"Resolved That the mortgage bearing date and executed on the 30th day of December 1889 and executed to this corporation by F. M. Tull, (widower) mortgagor and recorded in the office of the auditor of Spokane county, State of Washington, in volume 10 of the records of mortgages of said county at page 337, which said mortgage was executed by said mortgagor to secure the payment of the sum of twenty-five thousand ($25,000) dollars with interest at the rate of 7 per cent. per annum, be released. The following is a particular description of the property including the said mortgage,

Beginning on the south line of Riverside avenue in the city of Spokane Falls one hundred (100) feet east of the northwest corner of block nineteen (19) of the city of Spokane Falls and run-
455½ ning thence south parallel with the west line of said block nineteen one hundred feet; thence east parallel with the north line of said block nineteen fifty (50) feet; thence north one hundred (100) feet to the south line of Riverside avenue; thence west on the said south line to the place of beginning in the county of Spokane and State of Washington.

Be it further resolved: That Edward Kreese the first vice-president, and A. H. Muller the secretary *pro tem.* of this corporation, are hereby authorized to subscribe the name and affix the seal of this corporation to a release of the same as and for the corporate act and deed of said German Savings and Loan Society.

Attest my hand and seal of the said corporation.

(Signed) A. H. MULLER,

Secretary pro tem. of the German Savings and Loan Society.

Know all men by these presents: That the German Savings and Loan Society, the above-named corporation, in conformity with the above resolution of its board of directors, does hereby certify and declare that the mortgage set forth and described in the foregoing resolution which resolution is hereby referred to and made a part hereof, has been fully paid and discharged, together with the debt thereby secured.

In witness whereof the said The German Savings and Loan Society has caused its corporate seal to be hereunto affixed by Edward Kruse its first vice-president and A. H. Muller its secretary *pro tem.* this 13th day of May A. D. 1892.

THE GERMAN SAVINGS AND LOAN SOCIETY,
By EDWARD KRUSE, *First Vice-president and*
By A. H. MULLER, *Secretary pro tem.*

456 Signed, sealed, and delivered in presence of:
J. H. BERGHAUSER.
F. O. WEGENER.

[Seal German Savings & Loan Society, San Francisco.]

STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

This is to certify, that on this fourteenth day of May A. D. 1892 before me, the undersigned, a notary public in and for said county, and State, personally appeared Edward Kruse personally known to me to be the first vice-president of the German Savings and Loan Society, and A. H. Muller to me known to be the secretary *pro tem.* of said corporation, and they each acknowledged to me, that, they, by virtue of a resolution of said board of directors executed the within instrument on behalf of, and as the act and deed of the said The German Savings and Loan Society, freely and voluntarily, for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

E. O. WEGENER,
Notary Public in and for said County, City, and State.

[Seal F. O. Wegener, Notary Public, San Francisco, Cal.]

456½ This is to certify that the within instrument of writing was filed for record in the office of the auditor of Spokane county on the 20 day of May 1892 at 10 a. m. at the request of F. M. Tull.

J. J. L. PEEL, *Auditor,*
By W. H. HOSLER, *Deputy.*

457 PLAINTIFFS' EXHIBIT "42."

At a regular meeting of the board of directors of the German Savings and Loan Society, a corporation duly incorporated under the laws of the State of California, held on the 13th day of May, 1892, a resolution, of which the following is a copy, was duly adopted

by a majority vote of the members of said board and entered upon its records, viz:

Resolved: That the mortgage bearing date and executed on the 26th day of October, 1889, and executed to this corporation by F. M. Mull, (unmarried) mortgagor and recorded in the office of the auditor of Spokane county State of Washington, in volume W of the record of mortgages of said county at page 456, which said mortgage was executed by said mortgagor to secure the sum of fifty thousand ($50,000) dollars with interest at the rate of 7½ per cent. per annum, be released. The following is a particular description of the property included in said mortgage,

Those certain premises situated in the county of Spokane and Territory of Washington and described as follows, to wit: Beginning at the northwest corner of block nineteen (19) in the city of Spokane Falls, according to the resurvey and addition thereto, and running thence along the east line of Stevens street ninety-nine and
457½ forty-two one hundredths (99.42) feet; thence at right angles in an easterly direction parallel with the south line of Riverside avenue for one hundred (100) feet, thence at right angles parallel with the east line of Stevens street in a northerly direction to Riverside avenue, thence westerly along Riverside avenue to place of beginning.

Be it further resolved: That Edward Kruse the first vice-president and A. H. Muller, the secretary *pro tem.* of this corporation, are hereby authorized to subscribe the name and affix the seal of this corporation to a release of the same as and for the corporate act and deed of said The German Savings and Loan Society.

Attest my hand and seal of the said corporation.

A. H. MULLER,
Secretary pro tem. of said Society.

Know all men by these presents: That The German Savings and Loan Society, the above-named corporation, in conformity with the above resolution of its board of directors, does hereby certify and declare that the mortgage set forth and described herein and resolution, which resolution is hereby referred — and made a part hereof, has been fully paid and discharged, together with the debt thereby secured.

In witness whereof, the said The German Savings and Loan Society has caused its corporate name and seal to be hereunto affixed by Edward Kruse, its first vice-president, and A. H. Muller, its secretray *pro tem.* this 13th day of May 1892.

[SEAL.] THE GERMAN SAVINGS AND LOAN SOCIETY,
By EDWARD KRUSE,
First Vice-president.
A. H. MULLER, *Secretary pro tem.*

Signed, sealed and delivered in presence of—
J. H. BERGHAUSER.
E. O. WEGENER.

458 STATE OF CALIFORNIA, } ss:
County of San Francisco, }

This is to certify, that on this fourteenth day of May, 1892, before me the undersigned, personally appeared Edward Kruse, and A. H. Muller respectively the vice-president and secretary *pro tem.* of the German Savings and Loan Society, and they acknowledged to me, that, as such vice-president and secretary *pro tem.*, they, by virtue of a resolution of the board of directors of said corporation duly passed on the thirteenth day of May, 1892, executed the within instrument on behalf of, and as the act and deed of the German Savings and Loan Society, freely and voluntarily, for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above-written.

E. O. WEGENER,
Notary Public in and for said City, County, and State.

[Seal of F. O. Wegener, Notary Public, San]Francisco, California.]

458½ This is to certify that this instrument was filed for record in the office of the auditor of Spokane county on the 20 day of May 1892 at 10 o'clock a. m. at the request of F. M. Tull.

J. J. L. PEEL, *Auditor,*
By W. HOSLER, *Deputy.*

1.00.

459 PLAINTIFFS' EXHIBIT "43."

This indenture, of mortgage, made this 5th day of May, 1892, by and between F. M. Tull and Clara M. Tull (his wife) of the city of Spokane Falls, State of Washington parties of the first part and the German Savings and Loan Society, a corporation duly incorporated under the laws of the State of California, with its principal office in the city and county of San Francisco, State of California, party of the second part.

Witnesseth: That said parties of the first part, for and in consideration of the sum of one hundred thousand ($100,000.00) dollars gold coin of the United States, to them paid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargin, sell and convey, unto the said party of the second part, its successors and assigns, those certain premises situate in the county of Spokane, and State of Washington, and described as follows, to wit: Beginning at the southwest corner of block nineteen (19) of the city of Spokane Falls, according to the resurvey and addition thereto, and running thence south along the east line of Stevens street ninety-nine and forty-two one-hundred (99.42) feet; thence at right angles in an easterly direction parallel with the south line of Riverside avenue for one hundred (100) feet; thence at right angles parallel with the east line of Stevens street in a northerly direction to Riverside avenue; thence westerly along Riverside avenue to the place of beginning, in said

city of Spokane Falls, Spokane county, Washington. Also the following-described property. Beginning on the south line of Riverside avenue in the city of Spokane Falls, one hundred (100) feet east of the northwest corner of block nineteen (19) in the city of Spokane Falls, and running thence south parallel with the west line of said block nineteen (19) one hundred feet; thence east parallel
459½ with the north line of said block nineteen (19) fifty (50) feet; thence north one hundred (100) feet to the south line of Riverside avenue; thence west on said south line to the place of beginning, in said city of Spokane Falls, county of Spokane, Sate of Washington.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the said described premises unto the said party of the second part, its successors and assigns, for its own use, benefit and behoof forever; and the said parties of the first part hereby covenant and agree to and with the said party of the second part, its successors and assigns, that they are lawfully seized of said premises, and now have a valid and unincumbered fee-simple title thereto, and that they will, and their heirs, executors, and administrators shall forever warrant and defend the same against all lawful claims and demands.

The condition of the foregoing conveyance is such, that, whereas, the said parties of the first part have executed to the party of the second part, their promissory note, which is in substance as follows:

$100,000.00. PORTLAND, OREGON, *May 5th*, 1892.

On the 26th day of December, 1895, without grace, for value received, in gold coin of the United States, I, F. M. Tull and Clara M. Tull, promise to pay to the German Savings and Loan Society, or its order, in its office in the city of San Francisco, State of California, the sum of one hundred thousand ($100,000.00) dollars, in gold coin of the United States, with interest thereon from date, until paid, at the rate of seven per cent. per annum, said interest payable quarterly in like gold coin, and if not paid as it becomes due, is to be added to the principal sum, and become a part thereof, and thereafter is to bear interest at the same rate. And in case said quarterly interest, or any part
460 thereof, is not paid in ten days after the same becomes due and payable, then the whole of said principal sum and interest shall forthwith become due and payable, at the election of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay, in addition to the costs and disbursements provided by statute such sum as the court may adjudge reasonable as attorneys' fees in said suit or action. And I further promise to pay, on or before the first day of March in each year, the taxes and assessments in Washington upon the mortgage of even date herewith, given to secure this note and the debt thereby secured.

(Signed) F. M. TULL.
CLARA M. TULL.

And whereas, the said parties of the first part have covenanted and agreed, and do hereby covenant and agree, to pay all said sums of money, the principal and interest specified in said note, at the times therein designated, and to keep up and maintain, in all manner, the improvements on said premises, and to pay all taxes, assessments, mechanics' liens and incumbrances, and liens of every kind which may by law become due and payable on said premises, and also all taxes which may be levied or imposed on this mortgage, or the moneys thereby secured, and at their own expense to keep insured against loss by fire to the extent of not less than seventy thousand ($70,000.00) dollars, the present buildings, or any that may hereafter be erected on said premises during the existence of this debt, in such company as the party of the first part, its successors or assigns may select, with loss, if any, under such insurance payable to the party of the second part, its successors or assigns, and to deliver the policies and renewals thereof to the said party of the second part promptly after the issue thereof; and also that the said par-
460½ ties of the first part will not commit nor suffer any waste upon said premises, and that they will not cut, or permit to be cut any of the timber upon said premises, except such as may be necessary for ordinary family use, and to keep the said premises in a reasonable state of repair.

Now, therefore, if the said parties of the first part shall pay said promissory note in accordance with the terms thereof, both principal and interest, and all taxes, assessments, insurance, mechanics' liens and all other incumbrances and liens, in accordance with the terms of this mortgage, and shall fully satisfy and comply with the covenants hereinbefore set forth, then this conveyance to be void and of none effect; but otherwise to remain in full force and virtue as a mortgage to secure the payment of said promissory note in accordance with the terms thereof, and a performance of the conditions and agreements herein contained, and as such to be subject to foreclosure; it being agreed that any failure to make any of the payments provided for in this note, or this mortgage for a period of ten days after the same shall become due and payable, or to perform any agreement herein contained, shall give to the party of the second part, its successors or assigns, the option to declare the whole amount due on said note, or unpaid thereon, or on this mortgage, at once due and payable; and that if the said parties of the first part shall fail to pay the taxes, assessments, insurance, mechanics' liens or other incumbrances or liens as herein provided to be done, the party of the second part, its successors or assigns, shall have the option to pay the same, and the payment so made shall be added to and become part of the amount secured by this mortgage, and draw interest at the rate of ten per cent. per annum, payable annually, without waiver, however, of any rights arising from breach of any of the covenants herein.

It is further expressly agreed:

461 1st. That in case of filing a bill to foreclose this mortgage, the court may, on motion of the party of the second part, its successors or assigns, appoint a receiver to collect the rents and

profits arising out of said premises during the pendency of such foreclosure, and until the right of redemption expires, and such rents and profits shall be applied in payment *pro tanto* of the amount due under this mortgage.

2nd. In the event of this mortgage being foreclosed, the said parties of the first part shall pay such sum as the court may adjudge reasonable as attorneys' fees in said suit, and subject to this mortgage, the same shall be a lien upon said premises; which fee shall be due when suit is begun and shall be recovered whether final decree be entered or not, and as a part of the costs of the commencement of said suit.

In witness whereof, the said parties of the first part have hereunto set their hands and affixed their seals the day and year first above written.

F. M. TULL. [SEAL.]
CLARA M. TULL. [SEAL]

STATE OF WASHINGTON, } ss:
County of Spokane, }

I, John C. Onderdonk, a notary public within and for said county and State, do hereby certify that on this 5th day of May, 1892, personally appeared before me F. M. Tull and Clara M. Tull, his wife, to me known to be the individuals described in and who executed the within instrument, and ackowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 5th day of May, 1892.

JOHN C. ONDERDONK,
Notary Public for Washington, Residing at Spokane.

[Notarial Seal of John C. Onderdonk.]

461½ I certify that the within instrument of writing was received for record on the 5 day of May at 11.50 o'clock a. m. 1892, and recorded on page 101 in Book 44 of Mortgages.

J. J. L. PEEL,
Recorder of Conveyances,
By W. H. HOSLER, *Deputy.*

Req. Kinnaird & Happy.

462 PLAINTIFFS' EXHIBIT "44."

This indenture of mortgage made and entered into on this 23rd day of May, A. D. 1892 by and between F. M. Tull and Clara M. Tull, his wife, of Spokane, Washington, parties of the first part, and the German Savings and Loan Society, a corporation duly organized under the laws of the State of California, with its principal office in the city of San Francisco California, party of the second part.

Witnesseth: That said parties of the first part, for and in consideration of the sum of twenty thousand ($20,000.00) dollars gold coin of the United States, to them paid, the receipt whereof is hereby

acknowledged, has granted, bargained, sold and conveyed and by these presents, does grant, bargain, sell and convey, unto the said party of the second part, its successors and assigns, those certain premises stuated in the county of Spokane and State of Washington, and described as follows, to wit:

Beginning at the northwest corner of block 19 in the city of Spokane Falls (now Spokane) Spokane county, Washington, according to the resurvey and addition thereto; thence south along the east line of Stevens street 99.42 ft.; thence at right angles in an easterly direction parallel with the south line of Riverside Ave. in an easterly direction 100 ft.; thence at right angles parallel with the east line of Stevens St. in a northerly direction to Riverside avenue; thence westerly along Riverside avenue to the place of beginning. Also beginning on the south line of Riverside avenue 100 ft. east of the N. W. corner of block 19 in the city of Spokane Falls; thence south parallel with the west line of said block 19, 100 ft.; thence east parallel with the north line of said block 19 50 ft.; thence north 100 ft. to the south line of Riverside Ave.; thence west on said south line to the place of beginning.

Also beginning at a point on the north line of Sprague St. 90 ft. east from the S. W. cor. of block 19, resurvey and addition 462½ to Spokane Falls Spokane county Washington; thence east along said north line of Sprague St. 60 ft.; thence north 79.35 ft., more or less, to a point 100 ft. south of the south line of Riverside ave.; thence west 60 ft.; thence south 79.52 ft. more or less, to place of beginning.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the same the said described premises unto the said second part, its successors and assigns, for its own use, benefit and behoof forever, the said parties of the first part hereby covenanting to and with the said second party *part*, its successors and assigns, that they are lawfully seized of said premises, and now have a valid and unencumbered fee-simple title thereto except as hereinafter specified, and that they will, and their heirs, executors, and administrators and assigns forever warrant and defend the same against all lawful claims and demands.

The condition of the foregoing conveyance is such, that whereas the said parties of the first part have executed to the party of the second part their promissory note, which said note is in substance as follows:

$20,000.00. SPOKANE, WASHINGTON, *May 23rd*, 1892.

On the 23rd day of May, 1896, without grace, for value received, in gold coin of the United States, we jointly and severally promise to pay to the German Savings and Loan Society, or order, at its office in the city and county of San Francisco, State of California, the sum of twenty thousand dollars, (20,000) in gold coin of the United States with interest thereon from date, until paid, at the rate of seven (7) per cent. per annum; said interest payable quarterly in like gold coin, and if not so paid as it becomes due, it is to be

added to the principal sum, and become a part thereof, and
463 thereafter is to bear interest at the same rate. And in case said quarterly interest, or any part thereof, or any sum herein stipulated to be paid, is not paid in ten days after the same becomes due and payable, then the whole of said principal sum and interest shall forthwith become due and payable, at the election of the holder of this note. And in case suit or action is instituted to collect this note, or any part thereof, we promise to pay, in addition to the costs and disbursements provided by statute, such sum as the court may adjudge reasonable as attorneys' fees in said suit or action. And we further promise to pay, in each year at said office in San Francisco, all taxes assessed in the State of Washington upon the mortgage of even date herewith, given to secure this note and the debt thereby secured. Such payment of taxes to be made each year, at least ten days before such taxes become delinquent, according to the laws of said State.

(Signed) F. M. TULL,
CLARA M. TULL.

This mortgage is subject to a certain mortgage made by the parties of the first part herein to the party of the second part upon the two tracts of land first described herein, dated May 5th 1892, to secure the payment of $100,000.00 and interest, December 26th, 1895.

And whereas, the said parties of the first part have covenanted and agreed, and do hereby covenant and agree to pay all said sums of money, the principal and interest specified in said note, at the times therein designated, and to keep up and maintain in all manner, the improvements on said premises, and to pay all taxes, assessments and encumbrances of every kind which may by law become due and payable on said premises, and also all taxes which may be levied or imposed on this mortgage, or the moneys thereby secured, and at their own expense, to keep insured against a loss by fire to the extent of not less than ten thousand ($10,000.00) dollars, the present buildings, or any which may hereafter be erected on
463½ said premises during the continuance of this debt, in such company as the party of the second part, its successors or assigns, may elect with loss, if any, under such insurance, payable to said party of the second part, its successors or assigns; and to deliver the policies and renewals thereof to the party of the second part promptly after the issue thereof; and to keep the said premises in a reasonable state of repair.

Now, therefore, if the said parties of the first part shall pay said promissory note in accordance with the terms thereof, both principal and interest, and all taxes, assessments, insurance, and all other incumbrances, in accordance with the terms of this mortgage, and shall fully satisfy and comply with the covenants hereinbefore set forth, then this conveyance to be void and of none effect; but otherwise to remain in full force and virtue as a mortgage to secure the payment of said promissory note in accordance with the terms thereof, and a performance of the conditions and agreements herein contained, and subject to foreclosure; it being agreed that any

failure to make any of the payments provided for in said note or mortgage, for a period of ten days after the same shall become due and payable, or to perform any agreement herein contained, shall give to the party of the second part, its successors or assigns, the option to declare the whole amount due on said note or unpaid thereon, or on this mortgage, at once due and payable; and that if the said parties of the first part shall fail to pay the taxes, assessments insurance or other encumbrances, as herein provided to be done, the party of the second part, its successors or assigns, shall have the option to pay the same, and the payment so made shall be added to the principal sum secured by this mortgage, and draw interest at the rate of ten per cent. per annum, payable
464 annually, without waiver, however, of any rights arising from breach of any of the covenants herein.

It is further agreed:

1st. That in case of filing a bill for the foreclosure — this mortgage, the court may, on the motion of the party of the second part, its successors or assigns, appoint a receiver to collect the rents and profits arising out of said premises during the pendency of such foreclosure, and until the right of redemption expires, and such rents and profits shall be applied in payment *pro tanto* to the amount due under this mortgage.

2nd. In the event of this mortgage being foreclosed, the said parties of the first part shall pay such sum as the court may adjudge reasonable as attorneys' fees in said suit, and subject to this mortgage, the same shall be a lien upon said described premises; which said fee shall be due when suit is begun and shall be recovered whether final decree be entered or not and as a part of the costs of the commencement of said suit.

In witness whereof, the said parties of the first part have hereunto set their hands and affixed their seals the day and year first above written.

F. M. TULL. [L. S.]
CLARA M. TULL. [L. S.]

Signed, sealed and delivered in the presence —

T. M. McKINNEY.
J. M. KINNAIRD.

STATE OF WASHINGTON, } ss:
County of Spokane, }

This is to certify that on this 23rd day of May, 1892, before me, notary public in and for the said county and State, personally came F. M. Tull and Clara M. Tull, to me personally known to be the individuals described in and who executed the within instrument, and severally acknowledged to me that they signed and sealed the same as their free voluntary act and deed for the uses
464½ and purposes therein mentioned.

In witness whereof I have hereunto set my hand and official seal the day and year in this certificate first above written.

[Notarial Seal of T. M. McKinney.]

T. M. McKINNEY,
Notary Public in and for Spokane County,
State of Washington.

I certify that the within instrument was received by me for record on the 23 day of May at 3.15 o'clock p. m. 1892 and recorded at the request of Kinnaird & Happy on page 66 in Book 54 Mortgages of said county.

J. J. L. PEEL,
County Auditor for said County,
By W. H. HOSLER,
Deputy Auditor.

KINNAIRD & HAPPY,
Attorneys-at-law.

465 PLAINTIFFS' EXHIBIT "45."

The German Savings and Loan Society, 526 California street.

SAN FRANCISCO, *June 18th*, 1890.

Messrs. Turner & Graves, Spokane Falls, Wash.

GENTLEMEN: The undersigned has the honor to inform you that you have been appointed attorneys of this society for the examination of titles at Spokane Falls. Blank notes and mortgages of this society have been sent to Mr. Cutter, and probably have already been handed to you.

We remain,
Yours respectfully, GEO. TOURNY, *Sec.*

466 PLAINTIFFS' EXHIBIT "46"

$34,000 SPOKANE FALLS, WASH., *Dec.* 31, 1889.

For value received, five years after date, I promise to pay to the order of P. D. Tull, guardian of Dora M. Tull, Ernest B. Tull and William L. Tull, the sum of thirty-four thousand dollars, with interest from date till paid at rate of ten per cent. per annum payable annually.

(Signed) F. M. TULL.

467 PLAINTIFFS' EX. 48.

Summons.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

In the District Court for the Territory of Washington for the 4th Judicial District Holding, Terms at Spokane Falls, Spokane County, in said Territory.

LUCY A. TULL, Plaintiff,
vs.
FRANCIS M. TULL, Defendant.

The United States of America to Francis M. Tull, defendant:

You are hereby required to appear in an action brought against you by Lucy A. Tull, plaintiff, in the district court of the Territory of Washington, and for the 4th judicial district thereof, holding terms at Spokane Falls, Spokane county in said Territory, to answer the complaint of plaintiff, filed in Spokane county, within twenty days after the service of this summons, exclusive of the day of service, if served within said county; if not served within said county but within said district, in thirty days; if served within any other judicial district in the Territory, in forty days; if served by publication, within sixty days after the date of the first publication of this summons, or *if* the said plaintiff will take judgment against you by default, according to the prayer of the complaint. The cause and general nature of the said action is to recover judgment and decree of this court in favor of the plaintiff and against the defendant to compel the defendant to pay to the plaintiff alimony for the support of herself and her minor children, and counsel fees for her counsel in this action, and money to pay court expenses in waging this action. To recover from the said defendant certain real property situated in the county of Spokane and Territory of Washington, being the west half of lot — (3) and the east half of lot — (4) in block nineteen (19) and the west half of lot- four (4) and five (5) excepting out of them that belonging to Nelson Clark, being ninety (90) feet on Sprague street by eighty feet on Stevens street in
468 the form of a parallelogram, all in block nineteen (19) in the town (now city) of Spokane Falls, Also to enjoin the defendant from selling, mortgaging or in any manner incumbering or alienating the said property upon the ground of the fraudulent cruel conduct of plaintiff to defendant, and his abandonment of her, and of adultery committed by said defendant with one Susan Becket.

In witness the Hon. George Turner, associate justice of the supreme court of Washington Territory and judge of said court and the seal thereof affixed this 28th day of July, 1887.

[L. S.] D. A. CLEMENT, *Clerk.*

S. C. HYDE AND
GANAHL & HAGAN,
Plaintiff's Att'y-.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

I, James Glispin, sheriff of Spokane county Washington Territory do hereby certify that I served the within summons and annexed complaint on the within-named defendant F. M. Tull, in Spokane county, Washington Territory, on the 28th day of July, 1887, and then and there delivered to said defendant personally a copy of said summons; and that I at the same time and place delivered to the said defendant personally with said copy of summons a copy of the certified complaint in this action, in Spokane Falls, W. T.

JAMES GLISPIN,
Sheriff of Spokane County,
By A. J. DUNCAN, *Deputy.*

Returned and filed this 29th day of July, 1887.
D. A. CLEMENT, *Clerk.*

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

In the District Court of said Territory for the Fourth Judicial District, Holding Terms at Spokane Falls, in said Territory.

LUCY A. TULL, Plaintiff,
vs.
F. M. TULL, Defendant.

469 It is hereby stipulated by and between the parties to the above-entitled action, that said action be dismissed on the payment of the costs thereof by the defendant.
Dated this 30th day of July, 1887.
Plaintiff, LUCY A. TULL.
Defendant, F. M. TULL.

Filed August 1st, 1887.
D. A. CLEMENT, *Clerk.*

Motion.

Title of Court and Cause.

Comes now the plaintiff in the above-entitled action by her attorneys Ganahl & Hagan and S. C. Hyde, and move the court to strike from the files of said court the paper filed in said court on the 1st day of August, 1887, purporting to be a stipulation for the dismissal of said cause upon the grounds, among others, that no notice of said paper, or the filing thereof has ever been served upon the attorneys for the plaintiff, and that the same was filed with the intent to dismiss said cause without notice to or the consent of the attorneys for the plaintiff and that the same was filed in fraud of the rights of the plaintiff, and of the rights of her said attorneys, and upon the grounds that said stipulation was illegally obtained and filed and

was without the authority of law and without the consent or authority of plaintiff's said attorneys.

GANAHL & HAGAN AND
S. C. HYDE,
Attorneys for Plaintiff.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

I, James Glispin, sheriff of said county, do certify that I served the foregoing motion by delivering to the above-named Francis M. Tull personally at the county of Spokane and Territory of Washington, on the 9th day of Sept. 1887, a true, full and correct copy thereof.

JAMES GLISPIN,
Sheriff of Spokane County,
By A. J. DUNCAN, *Deputy.*

Filed September 9th 1887.
D. A. CLEMENT, *Clerk.*

470 PLAINTIFFS' EX. 49.

In the District Court of the Territory of Washington and for the Fourth Judicial District Thereof, Holding Terms at Spokane Falls.

LUCY A. TULL, Plaintiff, }
vs.
F. M. TULL, Defendant. }

To the Hon. George Turner, associate justice of the supreme court of said Territory and judge of the district court aforesaid:

Now comes the said Lucy A. Tull and complaining of the defendant Francis M. Tull, for cause of action alleges:

That she is now residing in Spokane Falls, Spokane county, Washington Territory, and that the last known place of residence of the defendant Francis M. Tull was also at Spokane Falls, county and Territory aforesaid

That heretofore to wit on the 3rd day of March, 1872, the plaintiff and the defendant were intermarried at the town of Andover, Harrison county, State of Missouri, and ever since have been and are yet husband and wife.

That during said marriage there has been born to the plaintiff and defendant as the fruit thereof the following-named children, to wit,—William Louis Tull, born August 10th, 1873; Dora May Tull, born November 9th, 1877, and Ernest B. Tull born June 2nd, 1883, all of whom are now and have been under the control and in the custody of the plaintiff as hereinafter set forth.

That the plaintiff and the defendant lived together from the date of said marriage as husband and wife up to the times and dates hereinafter mentioned.

That the first year of their married life was spent in the town of

Andover, State of Missouri, that they then moved to and lived at Davis City, in the State of Iowa, for about five years, whereupon they, the plaintiff and defendant moved to the city of Kingman, in the county of Kingman and State of Kansas, and took their residence there on or about the 9th day of February, 1887, where
471 they have since resided up to the times and dates hereinafter set forth.

That during all the married life of the plaintiff and the defendant as aforesaid, the plaintiff has conducted herself at all times and in all things as a faithful wife loving and obedient, and has done and performed all things incumbent upon her to be done, and performed by reason of her relation and position as wife of the defendant. But that defendant disregarding his marital vow and in violation thereof, on or about the 1st day of November, 1886, conceived and commenced a course of life and rule of conduct detrimental to the rights, welfare and happiness of this plaintiff, with the intention of depriving plaintiff not only of her rights and position as his wife, but conceived and commenced a plan of operation by which to deprive plaintiff of all and singular her rights as his wife in and to all the property, both real and personal, belonging to plaintiff and defendant, which plan and intention he has fraudulently concealed from the plaintiff up to and until within the last few days last past.

That on or about the 1st day of November, 1886, the defendant became criminally intimate with a certain servant girl, then in the employment of the plaintiff and defendant, at their said home in Kingman, county of Kingman and State of Kansas, and at said place on divers days committed adultery with the said girl whose name is Susan Becket and concealed from the plaintiff all knowledge of such intimacy and adultery with said Susan Becket. That in pursuance of said fraudulent, wicked and wrongful plan and intention of defendant to deprive plaintiff of her position as wife of defendant, defendant pretended to plaintiff and so informed her that he would go to the State of California, and select a place of business and home for plaintiff and defendant and that he would thereafter return to Kansas and bring the plaintiff and said minor children with him to the State of California to live. That in the month of December, 1886, defendant departed from their home in the State of
472 Kansas and came to the city of Spokane Falls, in the Territory of Washington, and entered into a contract for the purchase of the real property hereinafter described and made preparations to move to Washington Territory to live and engage in business. That defendant informed said Susan Becket of his said plans and intentions, and they conspired together to carry out said plans and intentions, and to conceal from plaintiff all knowledge thereof. That on or about the 8th day of January, 1887, defendant returned to the home of plaintiff and defendant in the State of Kansas. That he then and there informed and stated to plaintiff that he had been to the State of California, and concealed from plaintiff that he had been to the Territory of Washington and plaintiff had no knowledge thereof. That plaintiff and defendant then were the owners of real property of the value of about sixty thousand dollars, and

personal property of the value of about twenty thousand dollars, situated in the State of Kansas. That all of said property was the common earnings and accumulations of the plaintiff and defendant during their marriage and was the community property of plaintiff and defendant. That by the laws of said State of Kansas a married man cannot sell and convey real property without his wife joining him in the deed of conveyance by which the same is conveyed and sold. That in pursuance of said plans and intentions to defraud the plaintiff of her property rights and to deprive her of her position as his wife, the defendant falsely pretended to plaintiff that it would be for the best interests of plaintiff and defendant to sell their said property, and that if plaintiff would join with the defendant in a sale and conveyance thereof, he would take plaintiff and the said minor children with him and the proceeds of the sale of said property, and settle in the State of California, and reinvest the proceeds of the sale of said property in said State of California in property and business for the benefit of plaintiff and defendant; and would there provide for and be a dutiful and affectionate husband to plaintiff

That plaintiff believed the promises and representations of defendant to be true and made in good faith and relied upon
473 the same and by reason thereof and at the request of defendant joined with defendant in deeds and conveyances of said property and the same was during the months of January and February, 1887, sold by the defendant for the sum of about $80,000.00 and the proceeds thereof were retained by the defendant.

That in further pursuance of said fraudulent plan and intention the defendant on or about the 14th day of February, 1887, prevailed upon plaintiff to visit her father's home at Andover aforesaid, under the pretense that the plaintiff should there wait a short time when the defendant would come and accompany her to the State of California.

That after the plaintiff had gone at defendant's request to visit her father and await defendant's coming as aforesaid, he, the defendant lived and cohabited with said Susan Becket in open adultery, and traveled with her under an assumed name, and registered himself and said girl at different hotels under the name of George W. Reynolds and wife. That on the 29th day of February, 1887, the defendant and said girl, Susan Becket, traveled together as man and wife to the city of St. Joseph, Missouri, where they stopped as man and wife. That from the 26th day of February to the 29th day, 1887, the defendant visited the plaintiffs at her father's home in Andover and pretended to be in the pursuit of his legitimate business, as well as devoted to the plaintiff, and when he left the plaintiff at her father's house he immediately joined the said girl as aforesaid under said assumed name.

That about this time the defendant conceived the idea of kidnapping and taking away from the plaintiff her two youngest children then in *their* custody at her father's, and he did take them in the absence of plaintiff from her father's home and took them to Des Moines, Iowa, where he met the aforesaid girl at the Dupont hotel

where plaintiff found them on the following night, having traced her children to said hotel. That defendant then and there confessed to plaintiff his adulterous conduct and his cohabitations with the said servant girl and prevailed upon plaintiff to join him
474 as his wife. That he promised that he would reform his course of life, that he would lead a virtuous and strict life, and do and perform towards plaintiff all duties upon his part incumbent upon him as a true and faithful and loving husband.

That on about the 7th day of March, 1887, plaintiff and the defendant went to the city of Sacramento, California, at the defendant's request and upon the representations that he desired to make California his home. That defendant pretended and represented to the plaintiff that he had broken off all connection with said girl and left her at the city of Des Moines, Iowa, and plaintiff believed the said representations to be true. But the truth and fact is as plaintiff has subsequently ascertained, the defendant procured said Susan Becket to go to the town of Cheney, Wash. Ter. and to remain there until he, the said defendant, would join her and resume his adulterous relations with her, all of which until recently has been and was unknown to the plaintiff. That on or about the 18th day of March, 1887, the defendant still in pursuance of the fraudulent design to deceive the plaintiff and defraud her of her rights both as a wife and as to property rights and with the intention of resuming his illicit relations with said Susan Becket, falsely represented to the plaintiff that he the said defendant, was going to Portland, Or. to be gone only two weeks, whereupon he left her; and on or about April last the defendant returned to the home of plaintiff in Sacramento bringing with him the said Susan Becket, to the surprise and against the will of the plaintiff, and compelled the plaintiff by threats promises and pretenses to allow the girl to remain with them, and he and said girl pledging themselves to good and strict behavior and pretending that there *was* no illicit relations then existing between them, which was and is false. That the plaintiff at the time of the defendant's return as aforesaid was sick in bed and had been confined to her bed with sickness from the time he left to the date of his return, and did not have the physical strength or will, among strangers, to
475 assert her rights in the premises, and was prevented from so doing by the circumstances by which she was surrounded, the condition of her health and the false and fraudulent promises and pretenses of the defendant as aforesaid. That on or about January 15th 1887, at Kingman, Kansas, the plaintiff became enciente by the defendant, her husband, all of which was and had been known to the defendant during all the time and performances as aforesaid and which he well knew when he returned to Sacramento with said girl, and knowing plaintiff's delicate condition and infirm state of health, he then and there promised plaintiff that he would be to her a kind and indulgent husband and be true and faithful to her and cease all sexual intercourse with the said girl and protect all the rights and privileges of the plaintiff regarding her property rights and her rights as a wife. All of which were falsely made and promised, and

made with the intention to deceive and mislead this plaintiff and induce her to leave her home in Kingman, Kansas. That on or about the 11th day of May, 1887, the defendant left plaintiff in Sacramento, California, to be gone for two weeks pretending that he was going to Kingman Kansas for the purpose of settling up some unfinished business, when he would join plaintiff within two weeks, all of which was falsely represented and falsely and fraudulently pretended to plaintiff for the purpose of preventing her from making any inquiries as to his conduct and intentions. That she has received his said promise and pretentions of reform in good faith, and had believed and relied upon them, and had tolerated him as a husband only upon condition that his promises and pretenses were sincere and would be fulfilled. That the defendant lived and cohabited with the plaintiff during all this time up to the 11th day of May, 1887 as his wife and kept *her* from her the real intentions and actual movements of the defendant. That instead of going to Kingman, Kansas, the defendant came direct to Spokane Falls, Washington Territory and invested largely in real estate in the city of Spokane Falls, and commenced building a large brick building
476 upon a portion of the real estate so purchased, and claimed that his residence for the future was in Spokane Falls and not otherwise. That the said real estate so purchased by the defendant, as far as the plaintiff has been able to ascertain, is hereinafter set out and described. Plaintiff—that the promises of good and virtuous behavior on the part of the defendant were made to the plaintiff with the intention of deceiving plaintiff and to throw her off her guard, and to prevent any further investigation upon her part into his conduct, and was done with the false, fraudulent and dishonest design to procure a divorce from plaintiff unknown to her, and without serving a process upon her, and with the intention not only to deprive her of her position as a wife but of all her interest in and to the real estate and personal property owned, held and controlled by the defendant. And that after said promises were so made the said defendant kept up a confidential and loving correspondence with said Susan Becket, and kept said Susan Becket informed of his movements and designs. That the truth is plaintiff is informed and believes, that notwithstanding said promises and pretenses of reform, and of ceasing his illicit intercourse with the said servant girl, the defendant has continually supported said Susan Becket and has lived and cohabited with her at every opportunity that offered both at Cheney and at Spokane Falls, as well as in the State of California, at the times and dates aforesaid. That the plaintiff does not know of the whereabouts of said servant girl, but has been informed that her last place of residence was San Diego, California. That the defendant also falsely and fraudulently with the intent to deceive the plaintiff promised the father of plaintiff, that he would from and after February, 1887, be a true and loyal husband to the plaintiff, which partially induced plaintiff to take up her residence in California with defendant. That on or about the 21st day of May, 1887, the defendant left Spokane Falls and shortly thereafter arrived in Kingman, Kansas, leaving the said children

in the care and custody of the plaintiff and pretending
477 to plaintiff that — would soon return. That for the purpose of further deceiving plaintiff the defendant wrote to plaintiff from Spokane Falls, but falsely dated his letter Kingman, Kansas, sending the said letter to Kingman, Kansas, and having it there remailed to plaintiff all of which was in the execution of the fraudulent and dishonest purpose and design of defendant as aforesaid. That no time did the defendant tell plaintiff that he intended to go to Spokane Falls, or that he would be at Kingman only temporarily. That on or about July 5th, 1887, the plaintiff not having heard from her husband, defendant, and having heard that he had taken up residence in Spokane Falls, left the State of California, for the purpose of joining defendant at Spokane Falls, where she arrived in due course of travel. Plaintiff alleges that on the same day she left California for Spokane Falls the defendant left Spokane Falls for the East, the exact place being unknown to plaintiff. That at no time has defendant ever informed plaintiff of or betrayed to her any of his aforesaid fraudulent designs, but plaintiff charges the fact to be that the defendant conceived the idea and fraudulent design of procuring a divorce from the plaintiff secretly, and without the knowledge of plaintiff and without her having an opportunity of ever being heard in court. That the purpose of defendant in procuring the plaintiff to go to California, and the purpose of making those false, fraudulent and insincere promises to plaintiff have all been done in pursuance of the unlawful design of illegally and unjustly procuring a divorce from plaintiff, which defendant knew he could not procure if plaintiff was served with process. That defendant lived and cohabited with the plaintiff up to about the middle of May last, and from the time she left her home in Kansas to the present time he has continually known her post-office address and has always known that plaintiff was willing and anxious to join him either at Spokane Falls or elsewhere, and knew that the plaintiff was pregnant by him and that she was sick with such pregnancy, and
478 unable to undergo much exertion or excitement in traveling or otherwise. But in the meantime, knowing all these facts and with such fraudulent design, the defendant employed attorneys in Kingman, Kansas, and filed a pretended bill for divorce against this plaintiff, the grounds nature and extent of which are as yet unknown to the plaintiff, but that plaintiff has sent for the proceedings in said action, and when she shall have procured certified copies of the same she will make profert thereof and make the same a part of this complaint. The plaintiff has never had any notice of any such proceedings or suit pending or determined till the 15th day of July, 1887, when her counsel herein received information thereof by telegraph; all of which has been purposely, fraudulently, corruptly and designedly kept from the knowledge of plaintiff by defendant in order that said defendant could still persist in the aforesaid fraudulent designs and deprive plaintiff of her rights. That plaintiff is now sick, confined to her bed and among strangers unable to earn her living, in poor health and without means, and that the defendant has refused to contribute to the support or main-

tenance of plaintiff or her said children. That the defendant has the legal title to a large amount of real estate and money in the town of Spokane Falls, and property which is described in the schedule hereto attached and marked Exhibit "A" and made a part of this her complaint. Plaintiff knows of no other property belonging to defendant except moneys that he may have under his control; and charges the fact to be that defendant has property to the value all told, of not less than $80,000.00. That plaintiff is entitled to own and control one-half of the property so owned by defendant and entitled in good faith to be supported and maintained together with her said children out of the proceeds of the said property. And plaintiff is informed and believes through information and from the actual doings and deceptions of defendant, that he said defendant proposes to sell and incumber the real estate he owns in Spokane Falls,
and take the proceeds out of the jurisdiction of this court
479 and defraud plaintiff and her said children, if possible, out of
the same and to involve plaintiff in an expensive, harassing and useless litigation, in order that she may be compelled to sell her rights in and to said property. That unless protected by an injunctive order of this court, until plaintiff has taken steps to set aside the fraudulent divorce proceedings inaugurated by defendant against her in the district court of Kingman county, State of Kansas, plaintiff's rights will be impaired and greatly endangered and the defendant will defraud her and her said children out of their rights and falsely pretend that he is divorced from plaintiff. Plaintiff alleges that she is informed that defendant, in pursuance of his fraudulent intentions, has procured an *ex parte* decree divorcing the defendant from her, and pretending that he did not know of her residence, and falsely swearing to facts in order to deceive the court at Kingman, Kansas, into granting him said divorce which he knew was unjust, unwarranted and illegal. That the plaintiff intends to take the proper steps and proceedings immediately to have the same set aside. That plaintiff has been at large expense in coming to Spokane Falls where she has now taken up her residence and has employed counsel who sign this bill to enforce her rights herein, and is pecuniarily unable to pay them for the- services, unless through and by the aid and assistance of this honorable court, to be recovered from the aforesaid property held by the defendant. That the costs for living of herself and her three children will not be less than $150.00 per month, and the additional sum of $— per month for the education of her said children, one of whom is now at school at Oakland, State of California. That the plaintiff herself has no means or property nor friends in Spokane Falls; she therefore invokes the aid of this hon. court to assist her in the protection of her rights and property and to compel the defendant to support and maintain the plaintiff and her said children as he is in duty bound
to do, and that *when* the said false and fraudulent decree of
480 divorce brought into this court, plaintiff claims that it is
illegal and void and of no force and effect.

Wherefore by reason of the premises herein, plaintiff asks the judgment of the honorable court, first: that she be declared to be

the owner of all and singular the *indecided* half in and to all the property mentioned in Schedule "A," hereto attached, and that defendant be required to pay to the plaintiff or to her attorneys for alimony or money for maintenance in the sum of not less than $500.00 and the further sum of $200.00 per month thereafter until the plaintiff shall have resided in the jurisdiction of the court long enough to entitle her to maintain her action for divorce against defendant. And that defendant be compelled to pay her counsel and attorneys signing this bill in the sum of not less than $1,000.00 in cash and for the further sum of $5,000.00 at the termination of this action, and that in the meantime the plaintiff be declared to have the care, custody and control of her said minor children; and that the defendant be enjoined from selling, mortgaging alienating and encumbering in any manner any part or parcel of the real estate mentioned in Schedule "A" and that the same be taken in charge of the court, and if necessary a receiver be appointed for the purpose of carrying out the decree, orders and judgments that this court may make herein; and that so far as this plaintiff is concerned that the present decree from the district court of Kingman, Kansas, may be declared void and of no binding force or effect, and for the costs of this suit and for clerk's costs, sheriff's costs, and all costs and court expenses incident to the bringing of this suit.

S. C. HYDE,
GANAHL & HAGEN,
Attorneys for Plaintiff.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

I, Lucy A. Tull, being duly sworn, on oath do depose and
481 say; that I am the plaintiff in the above-entitled action; that I know the contents of the foregoing complaint, and that the same is true as I verily believe.

LUCY A. TULL.

Subscribed and sworn to before me this 28th day of July, A. D. 1887.

S. C. HYDE,
Notary Public for Wash. Ter.

SCHEDULE "A."

The following-described real property situated in the county of Spokane, Wash. Ter., to wit;—Beginning at a point on the south line of Riverside avenue ninety (90) feet east of the northwest corner of block (19) in the town of Spokane Falls, running thence east along said south line of Riverside avenue 60 feet, thence south 179 feet more or less, to Sprague street 60 feet; thence north to place of beginning; together with the hereditaments, tenements and appurtenances thereunto belonging. Also the following-described property situated in the county of Spokane, Territory of Washington, to wit: lots 4 and 5 in block 19 in the town of Spokane Falls, with

the tenements, hereditaments and appurtenances thereunto belonging, excepting therefrom that position thereof belonging to Nelson Clark being about 90 feet on Sprague street and 80 feet on Stevens street, in a rectangular form.

Original complaint. Filed in the office of the clerk of district court this 28th day of July, 1887.

D. A. CLEMENT, *Clerk.*

S. C. HYDE AND
GANAHL & HANEN,
Attorneys for Plaintiff.

482 DEFENDANTS' EXHIBIT "A."

I, the undersigned, do hereby appoint B. Goldsmith as my agent to procure for me a loan of forty thousand dollars, for the term of 3 years, at 8 per cent. interest per annum, said interest to be paid quarterly. Said loan to be secured by first mortgage upon the following-described real estate situate in the county of Spokane and Territory of Washington, and more fully described as follows:

Part of lots 4 & 5 in block 19 city of Spokane Falls, being 100 x 100 on S. E. corner of Riverside avenue & Stevens street in said town.

And I agree to pay all taxes assessed against said property, and all taxes assessed against said mortgage given by me as security for said loan. And I hereby agree to pay to said B. Goldsmith the sum of twelve hundred dollars for his services in procuring said loan, and for his services in examining said described property and the title thereto, and for making out the necessary papers, documents and mortgage. Said twelve hundred dollars to be payable on demand when said loan is completed, and when so paid by me to be payment in full for all services rendered to —— —— in said matter by said B. Goldsmith & I agree to furnish abstract of title.

Dated at Spokane Falls this 8 day of May, 1888.

F. M. TULL.

483 DEFENDANTS' EXHIBIT "L."

STATE OF KANSAS, *Kingman County,* } ss:

In the District Court of said County.

FRANK M. TULL, Plaintiff,
vs.
LUCY A. TULL, Defendant. } Petition.

Plaintiff complains of the above-named defendant, and for cause of complaint alleges:

That on or about the 3rd day of March, A. D., 1872 at the residence of defendant's parents, in the county of Harrison and
484 State of *Missouri*, the plaintiff and defendant intermarried and ever since have been and now are husband & wife,—

That the plaintiff now is and has *been* a resident of Kingman county & the State of Kansas for the period of eight years or more immediately preceeding the commencement of this action.

And further alleges that during the time he so lived and cohabited with said defendant as his wife, he at all times treated her with kindness, & affection, provided for her a *good* home, and with the necessaries, comforts & luxuries of life, so far as his means would permit,—

That the said defendant, disregarding the solemnity of her marriage vow, and her obligation to treat this plaintiff with fidelity respect & affection, and to protect her vows and her said husband's honor by guarding and preserving her own virtue—hath on numerous and divers occasions, at various places, committed adultery and had carnal connection, with many persons whose true name- are to the plaintiff unknown.

And that particularly on or about the — day of September 1884 at the city of Kingman in the State of Kansas, in the dwelling of this plaintiff, the said defendant did commit adultery and have carnal connection with one Richard Roe, whose true name is to this plaintiff unknown.

That each & all of said acts of adultery were committed by said defendant without the consent connivance, privity or procurement of this plaintiff, and that plaintiff has not *had* voluntarily cohabited with the defendant since he has known of the commission by defendant of the several acts of adultery above complained of.

485 That the issue of the said marriage of plaintiff and defendant are three children whose names and ages are as follows, to wit:

William L. Tull, aged 13 years.
Dora M. Tull, " 9 years and
Benjamin Tull, " 4 years.

Wherefore, plaintiff prays judgment that the bonds of matrimony between himself and the defendant be dissolved, and that he be awarded the care, custody, and control of said children.

(Signed) F. M. TULL.

STATE OF KANSAS, }
Kingman County, } ss:

Frank M. Tull of said county being duly sworn deposes & says, that he has heard read the foregoing petition by him subscribed and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated upon his information and belief, and as to those things he believes — to be true.

F. M. TULL.

Subscribed and sworn to before me this 25th day of February, 1887.

BION S. HUTCHINS,
Notary Public.

My commission expires Oct. 3, 1887.

We hereby agree to become surety for the payment of all costs that may accrue & be adjudged against the plaintiff in the above-entitled action.

F. M. TULL.
J. F. SPIGER.

Approved and filed by me this 25th day of Feb'y, 1887.

[Seal of the Court.]

BURT VENABLE,
Clerk Dist. Court,
By J. H. SMITH, *Dept.*

486 *Summons, Alias.*

Copy.

Printed at Kingman Leader job-rooms.

UNITED STATES OF AMERICA.

STATE OF KANSAS, } ss:
Kingman County, }

The State of Kansas to the sheriff of Sacramento county, State of California, Greeting:

You are hereby commanded to notify Lucy A. Tull that she has been sued by Frank M. Tull, action for divorce in the district court within and for said county of Kingman, and that unless she answer by the 10th day of June A. D. 1887, the petition of the said plaintiff against her filed in the office of the clerk of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 13th day of April 1887.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office in Kingman, this 23" day of March, 1887.

[SEAL.] BURT VENABLE,
Clerk of the District Court of Kingman County, Kansas.

STATE OF CALIFORNIA, } ss:
County of Sacramento, }

Received this writ this second day of April 1887 at 9.30 o'clock a. m.; and as commanded by this writ, I summoned the within-named Lucy A. Tull on the second day of April, 1887 by delivering to her a certified copy of the within summons and of the endorsement thereon; and I summoned the within-named Lucy A. Tull as above stated, on the second day of April 1887, at the city of Sacramento, State of California, in my county.

Dated Sacramento, Cal. April 2" 1887

M. M. DREW,
Sheriff Sacramento County, State of California.

487 Issued M'ch 3" 1887.
Returnable April 13" 1887
Answer due June 10" 1887
Filed April 9" 1887

BURT VENABLE, *Clerk.*

488 *Præcipe.*

Copy.

THE STATE OF KANSAS, } ss:
Kingman County, }

In the District Court for said County.

FRANK M. TULL, Plaintiff, }
vs.
LUCY A. TULL, Defendant. }

The clerk of the court will issue subpœna in the above-entitled action for Isac Tull, and Mrs. Issac Tull, direct to the sheriff of Kingman, Kansas, and returnable according to the law on the 9th day of May, inst.

ASHBAUGH & STECK,
Attorney- for Pl'ff.

Filed May 7th, 1887

BURT VENABLE, *Clerk.*

Præcipe.

Copy.

THE STATE OF KANSAS, } ss:
Kingman County, }

In the District Court for said County.

FRANK M. TULL, Plaintiff, }
vs.
LUCY A. TULL, Defendant. }

489 The clerk of the court will issue summons in the above-entitled action for said defendant, direct to the sheriff of the county of Harrison State of Missouri, and returnable according to law.

ASBAUGH & STECK,
Attorney- for Plaintiff.

Filed Feb'y 25 1887,

BURT VENABLE, *Clerk,*
J. H. SMITH, *Deputy.*

Copy.

In the District Court in and — the County of Kingman, State of Kansas.

F. M. TULL, Plaintiff,
vs.
LUCY A. TULL, Defendant.

Now comes the above-named defendant and for answer unto said plaintiff's petition herein filed, says: She denies each and every allegation in said petition contained.

LUCY A. TULL,
By J. W. HUGHES,
Her Attorney.

Filed April 19th, 1887.

BURT VENABLE, *Clerk.*

490 STATE OF KANSAS, *Kingman County,* } ss:

In the District Court for said County.

FRANK M. TULL, Pl'ff,
vs.
LUCY A. TULL, Def't.

Now on this 9th day of May A. D. 1887, the same being a day of the regular May term of said court, this cause coming on for trial and final decree, and it appearing to the court, now here that the said defendant has been personally served with a process of this court, in this cause—and the said defendant having appeared and answered herein, and now at this time the court having heard the testimony of the witnesses herein considered the same—it is found by the court that the said defendant Lucy A. Tull, has been guilty of the several acts of adultery in plaintiff's petition charged.

It is therefore considered, ordered and adjudged and decreed by the court now here that the bonds of matrimony existing between complainant and the defendant be dissolved, annulled and for naught held—and that each of said parties be henceforth free to marry again as if said marriage relations, had never existed, between said parties.

Dated May 20th 1887 A. D.

Approved

A. S. W. LESLIE, *Judge.*

Filed May 25th '87.

BURT VENABLE, *C. D. C.*,
Per SMITH, *Dep't.*

491 STATE OF KANSAS, *Kingman County,* } ss:

I, Geo. M. Deck, clerk of the district court within and for the county and State aforesaid, do hereby certify that as such clerk I am the keeper and have charge of all the records and seals of the above-

entitled court, including the papers, records and journal entries and all proceedings of whatsoever kind and nature in and to the above and foregoing suit, and I do further certify that the above and foregoing transcript is a full, true and correct copy of all papers, proceedings, journal entries or decrees of whatsoever kind and nature, filed, entered or docketed in the above-entitled cause or suit, as the same appears of record in my office, and that no appeal has been taken or is now pending in said suit or action, that the time for appeal thereto has expired, and that said decree is now, and ever since the rendition thereof has been, in full force and effect.

Witness my hand and the seal of said court hereto affixed in my office in the city of Kingman, county of Kingman, State of Kansas this 19th day of May, 1898.

[Seal District Court, Kingman County, Kan.]

GEO. M. DECK, *Clerk.*

STATE OF KANSAS, } ss:
Kingman County, }

I, G. W. McKay, judge of the district court of the State of
492 Kansas, within and for Kingman county, do hereby certify that the above and foregoing certificate is prepared, certified to and signed by Geo. M. Deck, who is the duly elected, qualified and acting clerk of the district court of the State of Kansas in and for Kingman county, and that as such clerk he is the keeper of the records and seals of said court; and I further certify that the seal hereto attached is the seal of said court and that said attestation of said clerk is in due form.

In witness whereof I have hereunto set my hand at my office in the city of Kingman, State of Kansas, this the 19th day of May, 1898.

G. W. McKAY.

493 (1765.) SEC. 1.—Jurisdiction.—SECTION 1. There shall be in each county organized for judicial purposes, a district court, which shall be a court of record, and shall have general original jurisdiction of all matters, both civil and criminal (not otherwise provided by law), and jurisdiction in cases of appeal and error from all inferior courts and tribunals, and shall have a general supervision and control of all such inferior courts and tribunals, to prevent and correct errors and abuses.

(4457.) SEC. 639.—Causes.—SEC. 639. The district court may grant a divorce for any of the following causes:

First. When either of the parties had a former husband or wife living at the time of the subsequent marriage. *Second.* Abandonment for one year. *Third.* Cruelty; adultery. *Fourth.* Impotency. *Fifth.* When the wife, at the time of the marriage, was pregnant by another than her husband. *Sixth.* Extreme cruelty. *Seventh.* Fraudulent contract. *Eighth.* Habitual drunkenness. *Ninth.* Gross neglect of duty. *Tenth.* The conviction of a felony, and imprisonment in the penitentiary therefor, subsequent to the marriage.

(3871.) SEC. 72.—Publication.—SEC. 72. Service may be had by publication in either of the following cases: In actions brought under the forty-sixth and forty-seventh sections of this code, where any or all the defendants reside out of the State; in actions brought to establish or set aside a will, where any or all of the defendants reside out of the State; in actions to obtain a divorce when the defendant resides out of this State; in actions brought against a non-
resident of this State, or a foreign corporation, having in this
494 State property or debts owing them, sought to be taken by any of the provisional remedies, or to be appropriated in any way; in actions which relate to, or the subject of which is, real or personal property in this State where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the State, or a foreign corporation; and in all actions where the defendant, being a resident of this State, has departed therefrom, or from the county of his residence with intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent.

(3875.) SEC. 76.—Personal service on non-residents.—SEC. 76. In all cases where service may be made by publication, personal service of summons may be made out of the State by the sheriff of the county in which such service may be made. Such summons shall be issued by the clerk, under seal of the court, and directed to the defendant or defendants to be served, and shall notify him or them that he or they have been sued by the plaintiff or plaintiffs, naming him or them, and requiring him or them to answer the petition filed by the plaintiff or plaintiffs, naming him or them, in the clerk's office, of the court, which shall be named, within sixty days from the day of service, or the said petition will be taken as true, and judgment rendered accordingly. Such service may be proved by the affidavit of the person making the same, before a clerk of a court of record, or other officer holding the seal thereof, or before some commissioner appointed by the governor of this State, under an act providing for the appointment of commissioners to take depositions,
etc.: *Provided* That such service, when made and proved as
495 aforesaid, shall have the same force and effect as service obtained by publication, and no other or greater force or effect.

(4464.) SEC. 646.—Property, rights, etc.; alimony.—SEC. 646. When a divorce shall be granted by reason of the fault or aggression of the husband, the wife shall be restored to all her lands, tenements and hereditaments not previously disposed of, and restored to her maiden name, if she so desires, and shall be allowed such alimony out of her husband's real and personal property as the court shall think reasonable, having due regard to the property which came to him by marriage, and the value of his real and personal estate at the time of said divorce, which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or installments, as the court may deem just and reasonable, and if the wife survive her husband, she

shall also be entitled to her right of dower in the real estate of her husband, not allowed her as alimony, of which he was seized at the time during the coverture, to which she had not relinquished her right of dower; but if the divorce shall arise by reason of the fault or aggression of the wife, she shall be barred of all right of dower in the lands of which her husband shall be seized at the time of the filing of the petition for divorce, or which he may thereafter acquire, whether there be issue or not; and the court shall order restoration to her of the whole of her lands, teneme-ts or hereditaments not previously disposed of, and also such share of her husband's real or personal property or both, as to such court may appear just and reasonable.

496 (4565.) SEC. 647.—Effect; review; bigamy.—SEC. 647. A divorce granted at the instance of one party shall operate as a disolution of the marriage contract as to both, and shall be a bar to any claim of the party, for whose fault it was granted, in or to the property of the other; and no proceeding for reversing or vacating the judgment or decree divorcing said parties shall be commenced unless within six months after the rendition of said judgment or decree, and during said six months and the pendency of said proceeding for reversing or vacating said judgment or decree it shall be unlawful for either of said parties to marry, and any person so marrying shall be deemed guilty of bigamy: *Provided*, such decree shall be final; and no proceedings in error to the supreme court shall be allowed or taken unless a notice of an intention to prosecute such proceedings in error be given in open court and noted on the journal of the court, within three days after the entry of the decree of judgment, and the petition in error and transcript be filed in the supreme court within three months after the rendition of such judgment or decree.

497 DEFENDANTS' EXHIBIT B.

STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court.

F. M. TULL, Plaintiff,
vs.
DORA MAY DORMITZER and ERNEST B. TULL, Infants, and P. D. Tull, as Guardian of said Dora May Dormitzer and Ernest B. Tull, Infants, and William L. Tull and Paul Dormitzer, Defendants.

To the honorable the judges of the superior court of Spokane county:

Plaintiff complains and alleges:

First. That heretofore, to wit, on the 23rd day of July, 1888, the defendant P. D. Tull, was by order of the probate court of Spokane county, Territory of Washington, duly and regularly made, appointed guardian of the persons and estates of the above-named defendants William L. Tull Dora M. Dormitzer, and Ernest B. Tull,

all of whom were then minors; that the said William L. Tull since said time and before the beginning of this action has reached his majority, but that the said Dora M. Dormitzer and Ernest B. Tull are at this time over the age of fourteen years but are still under the age of majority; that the said William L. Tull has not since reaching his majority had any accounting with the said P. D. Tull or received from him any portion of his estate; that before the bringing of this action the defendant Paul Dormitzer intermarried with the defendant Dora M. Dormitzer, then Dora M. Tull, and ever since said intermarriage said Paul and Dora M. Dormitzer have been and now are husband and wife, but the marriage of the
498 said Dora M. Dormitzer was without the consent of the plaintiff, who was then the sole surviving parent of said Dora M. Dormitzer.

Second. That on the third day of March, 1870, the plaintiff and Lucy A. Tull, now deceased, intermarried in the State of Missouri, and thereafter, until the decree of divorce hereinafter alleged, plaintiff and said Lucy A. Tull continued to be and were husband and wife, and citizens and residents of the State of Missouri and of the State of Kansas, and the defendants herein William L. Tull, Dora M. Dormitzer and Ernest B. Tull are the children of plaintiff and Lucy A. Tull, the fruits of said marriage.

Third. That prior to the 20th day of May, 1887, this plaintiff, while a resident of and domiciled in the said State of Kansas, acquired and held, owned and possessed, real and personal property consisting of lands, goods and chattels, choses in action and money, of the value of twenty-five thousand dollars, and owned and possessed said property in said State of Kansas on the said 20th day of May, 1887.

Fourth. That upon said 20th day of May, 1887, in the district court of Kingman county, State of Kansas, the same being a court of superior jurisdiction, in an action pending in said court, between this plaintiff, as plaintiff and the said Lucy A. Tull, then living, as defendant, of which said action the said district court had jurisdiction both of the subject-matter and of the parties, a decree was duly and regularly rendered dissolving and an-ulling the bonds of matrimony before that existing between this plaintiff and the said Lucy A. Tull, and thereafter, until the subsequent marriage of this plaintiff and the — Lucy A. Tull, each of them became and remained single.

Fifth. That under and by virtue of the laws of the State of Kansas, all real and personal property acquired by plaintiff in said State during the continuance of the marriage relation between
499 himself and Lucy A. Tull, belonged to and was vested in him as the owner thereof, subject to a dower interest in his wife of the realty, on his death, and that on the dissolution of said marriage as aforesaid the dower interest of his said wife ceased to exist under the said laws, and the plaintiff under the said laws then became and thereafter remained the owner of all such property, real and personal, freed from any dower or other interest, absolute

or contingent, present or remote, of his said former wife Lucy A. Tull.

Sixth. That after the granting of said decree of divorce this plaintiff converted all his property, real and personal, in said State of Kansas, into money and removed with the same to the State of Washington, and there invested fourteen thousand five hundred dollars thereof in the following-described real property, situate in the city and county of Spokane. and then Territory of Washington, to wit:

Beginning at a point on the south line of Riverside avenue ninety feet east of the northwest corner of block nineteen of the town of Spokane Falls; running then- east along the said south line of Riverside avenue sixty feet; thence south one hundred and seventy-nine feet more or less, to Sprague street; thence west along Sprague street sixty feet; thence north to the place of beginning.

Also beginning at the northwest corner of block nineteen of the town of Spokane Falls, according to the plat of the resurvey thereof; running thence easterly along the north line ninety feet; thence south at right angles with said north line ninety-nine feet, more or less, to the north line of the land hitherto conveyed by the said parties of the first part to Nelson Clark; thence westerly parallel with said north line ninety feet to the west line of said block nineteen; thence north along said west line to the place of beginning,—
500 the said properties combined constituting one piece of property, commencing at the southeast corner of Riverside avenue and Stevens street, running thence along the south line of Riverside avenue one hundred and fifty feet; running thence south parallel with Stevens street to Sprague street; running thence west along the north line of Sprague street sixty feet running thence north parallel with Stevens street eighty feet; running thence west at right angles ninety feet to Stevens street; and running thence along the east line of Stevens street to the place of beginning. That the contract of purchase for said real property was made by plaintiff after the granting of said decree of divorce, and the two deeds conveying said property to him were made respectively on the 7th day of June A. D. 1887 and the 19th day of August, A. D. 1887, and that the money with which the purchase price of said properties was paid was a part of the moneys brought by plaintiff with him from the State of Kansas and acquired by him in the manner aforesaid.

Seventh. That thereafter the said Lucy A. Tull removed to the State of Washington and on the 13th, day of August, 1887, this plaintiff and the said Lucy A. Tull again intermarried and become husband and wife and so remained until the death of the said Lucy A. Tull which occurred on the 18th day of July, 1888.

Eight. That after the death of the said Lucy A. Tull the defendant herein P. D. Tull acting as the guardian of the other defendants herein Dora M. Dormitzer, Ernest B. Tull and William M. Tull all of whom were then minors applied to the probate court of Spokane county, Territory of Washington and obtained, from said court an order and decree to sell in the manner provided by law, as the property of the said defendants William L. Tull, Dora M. Dormitzer

then Dora M. Tull and Ernest B. Tull for the purposes of reinvestment, an undivided one-half interest in the following-described real property, to wit:

Commencing at the northwest corner of block nineteen of the town of Spokane Falls aforesaid; running thence in a southerly direction along the east line of Stevens street ninety-nine and forty-two hundred-s feet; thence at right angles in an easterly di-
501 rection parallel with the south line of Riverside avenue one hundred feet; thence at right angles parallel with the east line of Stevens street in a northerly direction to the south line of Riverside avenue, and thence in a westerly direction along said last-named line to the place of beginning.

And on the 26th day of November, 1888, the said property was pursuant to said order of sale, sold by the said guardian and bought by this plaintiff for the sum of fourteen thousand dollars; that on the 14th day of September, 1889, the said defendant P. D. Tull applied to and obtained from the probate court of Spokane county, Territory of Washington, an order and decree to sell in the manner provided by law, as the property of the said defendants, for the purpose of reinvestment, an undivided one-half interest in the following-described real property, to wit:

Commencing at a point on the south line of Riverside avenue in the town of Spokane Falls aforesaid one hundred feet easterly from the northwest corner of said Riverside avenue; running thence along said line of the said Riverside avenue in an easterly direction fifty feet thence at right angles in a southerly direction one hundred and eighty feet more or less to the north line of Sprague street; thence at right angles along said line of Sprague street westerly sixty feet; thence in a northerly direction and parallel with Stevens street in said city eighty feet; thence in an easterly direction and parallel with the south line of said Riverside avenue ten feet; thence in a northerly direction and parallel with said Stevens street to the place of beginning, and on the 30th day of November 1889, the said property was, pursuant to said order of sale, sold by the guardian and bought by this plaintiff for the sum of twenty thousand dollars.

That the property so sold by the said guardian and pur-
502 chased by plaintiff was an undivided one-half interest in the property acquired by the plaintiff in the manner alleged in the sixth paragraph of this complaint.

Ninth. That upon the purchase of the first of said parcels of said property the plaintiff made, executed and delivered to the said P. D. Tull, as the guardian of each of the said defendants, his promissory note for the amount of the purchase price as aforesaid, and on the purchase of the second of said parcels of property, the said promissory note was delivered up to plaintif- and a new note for thirty-four thousand dollars was made, executed and delivered to said P. D. Tull, as guardian, by this plaintiff, the same being for the combined purchase price of both said parcels, and the said P. D. Tull, as such guardian, and as the result of said transactions now holds the said negotiable promissory note of plaintiff, dated December 31st, 1889, for the sum of thirty-four thousand dollars, payable to the

order of the said P. D. Tull, as guardian, five years after date, with interest at the rate of ten per cent. per annum until paid, and the said P. D. Tull and the other defendants now claim and insist that the said promissory note is meritorious, valid and binding, and constitutes a valid and binding obligation of this plaintiff which he is compelled to pay, and the said P. D. Tull threatens that he will negotiate and sell the said promissory note to an innocent purchaser so as to cut off any defence thereto on the part of plaintiff, and intends to and will do so unless restrained by the injunction of this honorable court.

Tenth. That at the time of the sale of said properties by the defendant P. D. Tull under and by virtue of the orders of the probate court of Spokane county the said P. D. Tull believed that the said property was the community property of plaintiff and said Lucy A. Tull, deceased, and that said defendants William L. Tull,
503 Dora M. Dormitzer and Ernest B. Tull, as the children of plaintiff and Lucy A. Tull, had inherited a half interest in said property on the death of the said Lucy A. Tull, and this plaintiff also believed such to be the fact, and that title to a half interest in said property had thereby become vested in the said defendants, and that the sale of said property and its purchase by this plaintiff and the execution and delivery of the said promissory notes, was the result of a mutual mistake as to the nature of the title of said defendants, and of this plaintiff, in said properties, participated in both by the defendant P. D. Tull, guardian of said minor defendants, and by this plaintiff, and said transactions would never have taken place but for the existence of said mutual mistake. And this plaintiff alleges further that the only consideration for the execution and delivery of said note was the supposed interest of the said minors in the said real property, and that the said minors had no interest in said property, but that title to the same in fee-simple was then and always had been vested in this plaintiff since its purchase by him, and that the said Lucy A. Tull never had any interest in the said property either as a member of the community or otherwise, and that the defendants William L. Tull, Dora M. Dormitzer and Ernest B. Tull took no interest whatever therein as the heirs-at-law of the said Lucy A. Tull, and that the said promissory note was wholly without consideration and void, and constitutes no valid and binding obligation against this plaintiff.

That plaintiff did not discover the said mistake concerning the title to said land which led to the transactions aforesaid until within the last two months.

Eleventh. That if notice of a motion for a temporary restraining order be given the defendant P. D. Tull, said Tull will dispose of the said promissory note before hearing, and thus defeat the
504 subject of this action, and that an exigency exists for the granting of a temporary, restraining order without notice.

Wherefore plaintiff prays:

1st. That the court decree that the said promissory note was made, executed and delivered as the result of a mutual mistake, and that the same was wholly without consideration, and that the same

constitutes no binding or valid obligation of this plaintiff, and that the court, by its decree, require the defendant P. D. Tull to deliver the said promissory note up into the treasury of this court, and that the same be cancelled and delivered to this plaintiff.

2nd. That the defendant P. D. Tull be enjoined and restrained pending this action from negotiating, selling, disposing of, or in anywise contracting concerning the said promissory note so as to prejudice the right of this defendant to have the same delivered up and cancelled as hereinbefore prayed.

3rd. For such other and further relief as to the court shall seem meet and equitable, and for costs of this action.

(Signed) GEORGE TURNER,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss:
County of Spokane, }

F. M. Tull, being first duly sworn on oath states: That he is the plaintiff in the above-entitled cause; that he has heard read the foregoing complaint; knows the contents thereof and believes the same to be true.

F. M. TULL.

Subscribed and sworn to before me this 6th day of Dec. 1894.
CHARLES H. WOLF,
Notary Public in and for the State of Washington,
Residing at the City of Spokane, Wash.

505 Filed Dec. 10 1894
C. O. DOWNING, *Clerk,*
By N. B. BUCKLEY, *Deputy.*

506 DEFENDANTS' EXHIBIT "B."

STATE OF WASHINGTON, }
County of Spokane. }

In the Superior Court.

F. M. TULL, Plaintiff,
vs.
DORA MAY DORMITZER ET AL., Defendants. }

It is hereby stipulated and agreed, by and between the parties to the above-entitled action, by their respective attorneys, that this action be dismissed without costs to either party.

W. A. LEWIS,
Attorney for Plaintiff.
NASH & NASH,
Attorneys for Defendants.

507 STATE OF WASHINGTON, } ss:
County of Spokane. }

In the Superior Court.

DORA MAY DORMITZER and WILLIAM L. TULL, Plaintiffs,
vs.
THE GERMAN SAVINGS & LOAN SOCIETY ET AL., Defendants.

I, William E. Richardson, do hereby certify that I am one of the judges of the above-entitled court; that I was present and presiding judge in the trial of the above-entitled action in the county of Spokane, State of Washington; that the foregoing is a true and correct record of all the matters, proceedings and testimony taken in said case and the same contains a complete statement of all the material facts, matters and proceedings therein, and the same is hereby made a part of the record herein, together with the exhibits hereto attached, which are made a part of this statement of facts.

Dated at Spokane, Wash., this 26th day of December, 1889.

WILLIAM E. RICHARDSON, *Judge.*

508 DORA MAY DORMITZER and WILLIAM L. TULL, Plaintiffs and Appellants,
v.
THE GERMAN SAVINGS AND LOAN SOCIETY, Respondent; Ernest B. Tull, Defendant and Appellant.

No. 3528.
Filed Nov. 7, 1900.

The issues tried in the court below are set forth in the respondent's brief, which for convenience we accept as a substantial statement of the same, and were as follows: The plaintiffs, Dora May Dormitzer and William L. Tull, filed their complaint in the action on the — day of April, 1897, making the respondent, The German Savings and Loan Society, together with F. M. Tull, P. D. Tull individually and as guardian of Ernest B. Tull, and Ernest B. Tull, a minor, and others, defendants. The complaint sets out two causes of action. The first cause, omitting the formal part, alleges that the plaintiffs and the minor defendant, Ernest B. Tull, are the children of F. M. Tull. That on the 3d day of July, 1888, the defendant, P. D. Tull, petitioned the probate court of Spokane county to be appointed guardian of the person and estate of the said minor children, and that on the 24th day of that month, said P. D. Tull was appointed their guardian, and he thereupon assumed, and has ever since assumed, to exercise the duties of guardian for them, and that at the time of his appointment as such guardian, Dora May was ten years of age, William B. fourteen, and Ernest B. five years of age, and all of them resided with their father, and that P. D. Tull is a brother of F. M. Tull. That on the 1st day of March, 1880, said F. M. Tull made, executed and delivered to P. D. Tull as said guardian, his promissory note for the sum of $14,000, due five years after date, with interest at 10 per cent.

per annum, and secured the same by a mortgage to said
509 guardian of even date therewith, upon the property described in said cause of action, which mortgage was filed for record on the 8th day of March, 1889. That on the 7th day of September, 1889, the said guardian released and satisfied said mortgage, which release was filed for record on the 11th day of September, 1889. That the release of the said mortgage by said guardian was executed without any order or judgment of the court authorizing him to execute the same, and without bringing the same to the attention or knowledge of the probate court, and was made without the payment of the debt secured thereby, and that the same is undischarged and unsatisfied. That said release and satisfaction was made in pursuance of a conspiracy made and entered into by the defendants, F. M. Tull, P. D. Tull and The German Savings and Loan Society, some time in the year 1888, with the fraudulent intent, among others, to cheat and defraud these plaintiffs and their brother. That on the 18th day of July, 1888, the plaintiffs and defendant, Ernest B. Tull, were the owners and seized in fee-simple of the property described in said mortgage. That P. D. Tull and F. M. Tull then and there conspired together, for the purpose of cheating the plaintiffs and their brother, Ernest B. Tull, out of the said real estate, procuring the appointment of the said P. D. Tull as guardian, and by the filing of a petition in the probate court of Spokane county, falsely alleging that it would be beneficial to the plaintiffs, and their brother to sell the interest in real estate above mentioned. That in pursuance of the said petition and influenced thereby and acting upon the same, said probate court ordered and decreed that the guardian sell said property for cash, to the highest bidder at public sale, which order was made on the 3d day of September, 1888, and pursuant to said order said guardian did sell said real estate on the 26th day of November, 1888, to F. M. Tull, and reported said sale to the court, which report was approved by the court on the 27th day of November, 1888.
510 That P. D. Tull, as guardian, made, executed and delivered to F. M. Tull, a guardian's deed, purporting to convey thereby to F. M. Tull all the right, title and interest of the said plaintiffs and their brother in and to said real estate, which deed was filed in the auditor's office on the 30th day of November, 1888, and recorded December 1, 1888. That said sale was not for cash, or for any consideration passing at that time, or at the time said deed was executed; that all the proceedings taken in said case and proceedings relative to the sale of said property were brought about by the defendants, F. M. Tull and P. D. Tull, for the purposes and object, among others, of securing to F. M. Tull the whole estate and undivided title and interest in and to the real estate, and for the purpose of cheating and defrauding plaintiffs and defendant, Ernest B. Tull. That the purchase price of $14,000, the purported consideration for said real estate, was grossly inadequate, and that at the date of the said transaction the interest of the plaintiffs and their brother was worth $35,000 and upwards. That twenty days after said guardian's deed was filed said F. M. Tull mortgaged

said real estate to the German Savings and Loan Society, to secure F. M. Tull's promissory note of $40,000, which mortgage was executed by F. M. Tull on the 6th day of December, 1888, and filed in the auditor's office on the 21st day of January, 1889. That the said mortgage had been negotiated and its terms and conditions had been agreed and determined upon by the parties previous to the said guardian's proceedings. That previous to the 1st day of August, 1888, the date when P. D. Tull, as guardian, filed his petition to sell said real estate, the German Savings and Loan Society knew the condition of the said property and all about the title to the same; and that the guardianship proceedings aforesaid were arranged, conceived and all such details were settled and agreed upon by F. M. and P. D. Tull, and their attorneys, and the German Savings and Loan Society, and its attorneys, and that the attorneys of these several defendants, jointly drew up and
511 indited the various petitions and orders drawn up and presented in said case No. 219. That the German Savings and Loan Society, at the time of the execution of the guardian's deed, and in all the proceedings leading up thereto, knew that plaintiffs' and their brother's interest in said property was worth the sum of $35,000 and upwards, and that the decree authorizing said sale was a subterfuge arranged by F. M. Tull for his own benefit and advantage. That when said guardian's sale was reported to have been made for cash, the German Savings and Loan Society knew that said report was false, and that said sale was not for cash, or anything of value, and that said report was made by said guardian, was false and fraudulent and as a part of the fraudulent purpose of F. M. Tull, said order of sale and guardian's deed were procured in order to allow F. M. Tull to mortgage said real estate for his own benefit and advantage, to the German Savings and Loan Society, for $40,000. That on the 7th day of March, 1889, the guardian, P. D. Tull, reported to the probate court that he had invested the proceeds of said sale in the notes of F. M. Tull, dated March 1, 1889, and secured by a mortgage on real estate, which is the same note and mortgage heretofore mentioned. That the said report of the guardian committed a fraud upon said court and plaintiffs, and that he did not state in said report whether the said mortgage was a first or second mortgage on said real estate, when in truth and in fact said mortgage was a second mortgage on said real estate, to wit: second to the mortgage of $40,000 held by the German Savings and Loan Society, and said society knew that the said guardian had perpetrated said fraud upon the court and plaintiffs. That on the 5th day of November, 1889, the said The German Savings and Loan Society released said $40,000 and said release was filed on the 11th day of November, 1889. That on the 26th day of October, 1889, F. M. Tull gave to the German Savings and Loan Society a mortgage on said property to secure his promissory note for $50,000, which was recorded on the 25th day of November, 1889. That on the 13th day of May, 1892,
512 said $50,000 was duly and regularly released by a release deed, filed May 20, 1892. That on the 6th day of May, 1892, F. M.

Tull mortgaged the real estate above described, and other real estate, to the German Savings and Loan Society, to secure F. M. Tull's note for $100,000, which mortgage was recorded in the auditor's office of Spokane county; which mortgage was thereafter foreclosed by the German Savings and Loan Society, and under and by virtue of a deed executed in pursuance of said foreclosure proceeding, said The German Savings and Loan Society claimed to be the owner of the said real estate. That said guardian made no reports or entered any account, as such guardian, after December 10, 1889. That in the guardian's petition in case No. 219, filed August 1, 1888, the defendant, P. D. Tull, as guardian, described and mentioned said real property of the plaintiffs and their brother, and alleged that said property was mortgaged for $20,000, which was false. That there was no mortgage on said property, and the German Savings and Loan Society knew that fact. That the said property mentioned and the real estate described herein, was fraudulently sold and disposed of to the German Savings and Loan Society, and which sale is made the second cause of action as against the defendants joined herein. That when the order of sale was made on December 10, 1889, disposing of said last-mentioned property, no proceeding was thereafter taken in said case by said guardian; that he is now and always has been in default and never has pretended to report to the court regarding said real estate, or in any way reported his acts as guardian, except to make and file in said case such records and papers as would effectually dispose of said wards' property. That on the 20th day of February, 1894, Dora May Tull was legally and lawfully married to Paul C. Dormitzer. That at the time of the sale of the said real estate to said F. M. Tull by said guardian, no appraisers were appointed to appraise the same; no guardian *ad litem* was appointed to protect the interests of the said plaintiffs and their brother, and there was no bidder at said sale except F. M.
513 Tull, and the German Savings and Loan Society knew all of the said facts. That the bond executed by said guardian for the faithful execution of his trust is invalid and void, not being such a bond as is required of guardians; that the sureties are insolvent; P. D. Tull is unable to respond in damages to the amount of said notes and interest; that the bond required by statute of the guardian, when making the sale of their wards' said real estate, and filed herein by P. D. Tull, was cancelled and discharged by the court immediately after the sale of the said property, and that the sureties thereon are insolvent. That the defendant, Ernest B. Tull, is a minor of the age of sixteen years, residing with his father, F. M. Tull; wherefore, he is made a party defendant to this action. That plaintiffs had no knowledge or information of the fraud set forth herein, until immediately before the commencement of this suit.

The second cause of action is substantially the same as the first, except that it relates to a note and mortgage for $34,000, given by the father to the guardian on the 31st day of December, 1889, and recorded on the 4th day of January, 1890, and afterward, on the 7th day of April, 1892, released by the guardian; and also to the pro-

ceedings leading up to the sale by the guardian to F. M. Tull of certain other real estate, described in paragraph 11, second cause of action, for the sum of $20,000; the report to and confirmation by the court of the sale; the claim that the children of F. M. Tull were the owners of the undivided half of the last-named real estate on the 12th day of August, 1889. Paragraph 22 of the second cause of action alleges that "said guardian invested the proceeds of his said "sale in the note of F. M. Tull for $34,000, which said note "was secured by mortgage on that piece of real estate described
"as commencing at the northwest corner of block 19, in the
514 "city of Spokane, Washington, and running east on the south
"line of Riverside avenue 100 feet; thence south parallel "with the east line of Stevens street 99½ feet; thence west parallel "with the south line of Riverside avenue 100 feet to the east line of "Stevens street; thence on said east line of Stevens street to the "place of beginning, with the buildings thereon, which is the same "note and mortgage sued on herein and set forth. That said note "of $34,000 contains also the debt of $14,000 owed by F. M. Tull to "plaintiffs and Ernest B. Tull, and which is made the subject of the "first cause of action, joined herewith." It is also shown, in paragraph 24, that May 23, 1893, F. M. Tull gave an additional mortgage to the German Savings and Loan Society, to secure the payment of $20,000, which mortgage covered all the property described in the plaintiffs' complaint.

The plaintiffs pray upon the first cause of action: That the release of the $14,000 mortgage be set aside and declared to be a fraud upon plaintiffs and void. That plaintiffs have a personal judgment against F. M. Tull for $14,000 and interest thereon from March 1, 1889; also the sum of $500 attorneys' fees. That the usual decree be made for the sale of said mortgaged premises in the manner provided by law, and that the proceeds of the sale be applied in payment of the amount found due plaintiffs herein, etc. That the defendants in this complaint named and each of them, and all persons claiming under them subsequent to the mortgage above set forth, may be forever barred and foreclosed of and from all right, estate, title, interest, claim, lien and equity of redemption of, in, to or upon said mortgaged premises, and every portion of the same. That the mortgage claimed by the German Savings and Loan Society be especially declared subsequent to plaintiffs' mortgage. That the plaintiffs may have execution against F. M. Tull or against any other property not exempt from execution, for any deficiency, etc.,
after applying the proceeds of sale of said mortgaged prem-
515 ises, properly applicable thereto, toward the payment of
whatever judgment it may recover against him in this cause of action. That the plaintiffs may become the purchasers of said property at such sale; that the purchaser may be let into possession thereof, upon production of the sheriff's certificate of sale thereof. That the plaintiffs may have such other and further relief in the premises as to this honorable court may seem meet, equitable and just.

Upon the second cause the prayer is identical as to the kind of relief prayed for and need not be repeated here.

The answer of the German Savings and Loan Society put in issue all the material allegations of the complaint, including those claiming for the plaintiffs and Ernest B. Tull, ownership in fee of the undivided one-half of the real estate described in the complaint, and those charging fraud, conspiracy and collusion between F. M. Tull, P. D. Tull and the German Savings and Loan Society, to cheat and defraud the plaintiffs and their brother, and notice and knowledge on the part of the German Savings and Loan Society.

In addition to a denial of the material allegations of the complaint, the defendant, The German Savings and Loan Society, interposed the following affirmative defenses in substance:

First. That the German Savings and Loan Society, being a corporation duly organized under the laws of the State of California, and duly authorized to transact the business of loaning money and taking security therefor in the State of Washington, upon the application of F. M. Tull therefor, loaned him the several sums of money mentioned in the complaint; first, $40,000, afterward paid from insurance money; afterward $50,000, then $25,000 additional, which last two loans were taken up by a loan of $100,000 from the German Savings and Loan Society to F. M. Tull, made on or about May 5th 1892. That finally on or about the — day of May, 1893, a further loan was made by the said loan society to said F. M. Tull of $20,000. That these several loans were secured at the times they were made
516 by mortgage duly executed and delivered by the said F. M. Tull upon the real estate or some part thereof, described in the complaint, and in said loans, as was its custom and practice, respondent required the applicant, F. M. Tull, to make truthful and correct statements of the condition and title of the land upon which such loan was sought; furnish respondent's legal adviser a correct abstract of title thereto, duly certified by some reputable and reliable searcher of titles, and upon such statements so made and abstracts so furnished, and upon the certificate of respondent's legal adviser that the said F. M. Tull was the owner of a good title in fee to said premises, the said several loans were made and mortgages taken by the respondent, and that in making each and all of said loans and taking said mortgages as security therefor, the respondent had no knowledge or means of knowledge, other than the public records concerning the title to said property, and the record of each of the mortgages in the complaint pleaded as having been given to said guardian showed the same to have been paid, satisfied and discharged, and the entries of payment, satisfaction and discharge of the said mortgages upon which respondent relied in making its said loans are the same releases of mortgages pleaded in paragraph 9 of plaintiffs' first and second causes of action, and that in making said loans and taking such mortgages given to respondent, it fully relied upon the truthfulness and good faith of said releases, discharges and acknowledgments of payment as the same appeared of record; that the said mortgagee was authorized to make and file said releases and discharges, and respondent so believed, and without such belief

on its part none of said moneys would have been loaned and advanced by it. That the attorneys employed by defendant as aforesaid to pass opinions upon such titles were skillful and competent attorneys learned in the law.

Second. That F. M. Tull and Lucy A. Tull were married on or about the 3d day of March, 1870, and thereafter continuously
517 till about the 20th day of May, 1887, were residents, householders and inhabitants of the State of Kansas. That on or about the 31st day of October, 1868, a law was enacted in that State creating district courts, and conferring upon them general jurisdiction; that on or before March 16, 1871, there was enacted into a law in said State an act entitled, "Divorce and alimony," which defines the cases for which divorces may be granted, amongst which is that of adultery, which ever since has remained the law of Kansas. That on the 25th day of February, 1887, the defendant, F. M. Tull, as plaintiff, filed his complaint in the district court of Kingman county, Kansas, against Lucy A. Tull, as defendant, alleging as a ground of divorce that the said Lucy A. Tull had on divers times and at different places committed adultery and had carnal intercourse with many persons in said complaint mentioned, and prayed that the bonds of matrimony be dissolved between them. That on or before the 23d day of February, 1871, the legislature of the State of Kansas enacted a statute entitled, "Commencement of civil actions," section 72 of which act provides *inter alia* that service may be had by publication in * * * actions to obtain a divorce when the defendant resides out of the State. * * * And in all actions where the defendant, being a resident of this State, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent. Section 76 of said last-named act provides that in all cases where service may be made by publication, personal service of the summons may be made out of the State by the sheriff of the county in which such service may be made. Such summons shall be issued by the clerk, under seal of court, and directed to the defendant or defendants to be served, and shall notify him or them, that he or they have been served by the plaintiff or plaintiffs, naming him or them, and requiring him or them to answer the petition naming him or them in the clerk's office, of the court, which shall be named, within sixty days from
518 the day of service, or the petition will be taken as true and judgment rendered accordingly. Such service may be proved by the affidavit of the person making the same, before a clerk of a court of record, or other officer holding the seal thereof, or before some commissioner appointed by the governor of this State, under an act providing for the appointment of commissioners to take depositions, etc. Provided that such service when made and proved as aforesaid, shall have the same effect as service obtained by publication, and no other or greater force or effect. That said act and each and every section thereof took effect on or about the 23d of February, 1871, and was and now is a general law of the State of Kansas, in full force and effect, unrepealed and unamended. That

thereafter personal service of the summons and complaint was made upon the defendant, Lucy A. Tull, in the State of California, and thereafter, on the 20th day of May, 1887, the said district court having jurisdiction of the subject-matter and of the parties thereto, granted the prayer of the said plaintiff, and then and there duly and regularly ordered and decreed and entered a decree, then and there forever dissolving the bonds of matrimony before that time existing between the said plaintiff and the said Lucy A. Tull, by reason of the faults, miscarriages and aggressions of said defendant, Lucy A. Tull, as set out in his said complaint, and that thereafter and until the subsequent marriage between them, the said F. M. Tull and Lucy A. Tull became and remained single persons. That while the said F. M. Tull was a resident of and domiciled in the State of Kansas he acquired property consisting of goods, chattels, choses in action and money of the value of $35,000 and owned and possessed said property in said State of Kansas on the 20th day of May, 1887. That section 646 of said act entitled "Divorce and alimony," provides that "if the "decree shall arise by reason of the fault or aggression of the wife, "she shall be barred of all right of dower in the lands of which "her husband shall be seized at the time of the filing of the peti-
"tion for divorce, or which he may thereafter acquire,
519 "whether there be issue or not; and the court shall order
"restoration to her of the whole of her lands, tenements or "hereditaments not previously disposed of, and also such share in "her husband's real or personal property or both as to such court "may appear just and reasonable." Section 647 provides: "A di-"vorce granted at the instance of one party shall operate as a disso-"lution of the marriage contract as to both, and shall be a bar to "any claims of the party for whose fault it is granted or to the prop-"erty of the other," etc. That on or before the 31st day of October, 1868, by the legislature of the State of Kansas, there was duly and regularly passed and enacted as a law of said State, an act entitled, "Descents and distributions." Section 8 of said act provides as follows: One-half in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest, which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executor as her property, in fee-simple, upon the death of the husband, if she survives him: provided, that the wife shall not be entitled to any interest under the provisions of this section, in any land to which the husband has made a conveyance, when the wife at the time of the conveyance is not, or never has been a resident of the State. * * * Section 28 provides as follows: "All the provisions herein made in relation to the widow of a "deceased husband, shall be applicable to the husband of a deceased "wife. Each is entitled to the same rights or portion in the "estate of the other, and like interests shall in the same man-"ner descend to their respective heirs. The estates of dower "and curtesy are abolished." That said act and each and every section and part thereof took effect October 31, 1868, and ever

since has been and now is a general law of the State of Kansas, in full force and effect, unrepealed and unamended. That the said Lucy A. Tull, her heirs, assigns, administrators or legal repre-
520 sentatives, under or by virtue of the laws of the State of Kansas, has or had no other right or interest in and to the said property of the said defendant, F. M. Tull, neither real nor personal, except that given by the laws of the said State of Kansas hereinabove last mentioned, and which interest, if at all, became vested in the realty only, in the event of said F. M. Tull's death. But that on the dissolution of the said marriage aforesaid and her death, the interest of the said Lucy A. Tull, her heirs, assigns, administrators or legal representatives, in or to the said property of the said F. M. Tull ceased to exist, under said laws, and the said F. M. Tull, under the laws of the State of Kansas, then and there became and thereafter remained the owner of the said property, free from any interest, absolute or contingent, present or remote, of his said former wife, Lucy A. Tull, or her heirs, assigns, executors, administrators or legal representatives. Then follows the allegation of the conversion by F. M. Tull of his property, real and personal, into money, and his removal to this State, the purchase of the property after the divorce with the money brought by him from and acquired by him in the State of Kansas, and obtaining a deed for a part thereof June 17, 1887, and the balance August 19, 1887; the remarriage of F. M. Tull and Lucy A. Tull, August 13, 1887, and her death July 18, 1888. It was further pleaded that the said Lucy A. Tull never had any interest in the property described in the complaint; that the guardian's sales of the undivided half of a portion of said property for $14,000 and of the other portion for $20,000 were made by mutual mistake of said F. M. and P. D. Tull, and under the mistaken belief that Lucy A. Tull was in her lifetime, by virtue of being the wife of F. M. Tull, the owner of the undivided half interest therein as the community property of F. M. and Lucy A. Tull, as husband and wife; that no title, interest, right or claim thereto passed to the said plaintiffs or the said Ernest B. Tull by reason of the death of the said Lucy A. Tull; and that the sole consideration for the said notes of $14,000 and $34,000 was the supposed interest of the said plaintiffs
521 and Ernest B. Tull in said real estate, and that the said notes were wholly without consideration and void. That the money loaned by the German Savings and Loan Society to F. M. Tull was so loaned with the understanding and agreement that the same was to be and in fact was used in the making of permanent improvements upon said property, and the removal of divers and sundry liens thereon. That F. M. Tull became insolvent prior to the foreclosure of the German Savings and Loan Society's mortgages and continues so to be. That the property is scant security for the mortgage indebtedness. It was further pleaded in said second affirmative defense that on the 10th day of December, 1894, F. M. Tull as plaintiff began an action in the superior court of Spokane county, against P. D. Tull as guardian of said Dora May Dormitzer, Ernest B. and William L. Tull, and upon allegations substantially the same as those hereinbefore pleaded, the court

made and entered a restraining order in accordance with the prayer of the complaint, enjoining and restraining the said P. D. Tull until the further order of the court from negotiating, selling, disposing of or in anywise contracting, concerning the promissory note described in the complaint, so as to prejudice the rights of the plaintiff to have the same delivered up and cancelled as prayed in the complaint of which said restraining order the said P. D. Tull was duly notified by the service upon him of a copy thereof and otherwise, which said restraining order still remains unvacated and of force and said action still pending. The cross-complaint and answer of the guardian *ad litem* is identical with the complaint filed by the plaintiffs, except as to the relief prayed for. The plaintiffs pray for the foreclosure of two mortgages. The guardian *ad litem*, however, prays:

"That all the proceedings had in the matter of the estate of Wil-
"liam L. Tull as against this defendant be declared void, and of
"no force and effect and a fraud upon said defendant; that this de-
"fendant, Ernest B. Tull, be declared to be the legal owner
522 "of an undivided one-third of one-half of the real estate men-
"tioned in said cross-complaint; that the deeds, conveyances
"or mortgages held by the German Savings and Loan Society as
"against this defendant to said property be cancelled, set aside and
"held for naught, and that said defendant deliver to said Ernest B.
"Tull a deed of conveyance to an undivided one-third of one-half of
"the said real estate, or that some person be appointed by this hon-
"orable court to do it for said defendant, and in case this cannot be
"done and this relief decreed to Ernest B. Tull, then this defendant
"prays for foreclosure of the mortgages," as was prayed for by the plaintiffs.

To this alleged answer and cross-complaint of the said minor defendant, the defendant The German Savings and Loan Society interposed the same answer and defense as were made to the plaintiff's complaint, and therefore need not be repeated in this connection.

To these affirmative answers and defenses made by the German Savings and Loan Society the plaintiffs and the guardian *ad litem* on behalf of the minor, Ernest B. Tull, on or about the 12th day of May, 1898, filed replications. To the first affirmative defense the reply admitted nearly all the material allegations and amongst other things, it was admitted that F. M. Tull and Lucy A. Tull were intermarried and became husband and wife on March the 3d, 1870, and resided in Kansas up to and prior to May the 20th, 1887; and that F. M. Tull purchased the property described in plaintiff's complaint; that F. M. Tull prior to the foreclosure of the mortgages given to the German Savings and Loan Society, became and continues insolvent.

By way of second reply to said first affirmative defense it was alleged that the abstracts of title relied on by the German Savings and Loan Society, in making its loans, were imperfect and defective in every respect, in that said abstract failed to show that P. D. Tull, as guardian, ever gave the requisite security, as such guardian, as

the law required, and alleges that P. D. Tull never gave and exe
cuted a bond required by the laws of the Territory and State
523 of Washington, and that the probate court of the said Terri-
tory never took from P. D. Tull, as guardian of the plaintiffs, any bond with approved sureties, payable to the Territory of Washington, in a sum double the defendant's estate, real and personal, as by the statutes made and provided. That P. D. Tull filed in the probate court an instrument which purported to be his bond as guardian, executed on the 23d day of July, 1888, conditioned in the sum of $9,600; that the sureties thereon are F. M. Tull, defendant herein, and one C. H. McCamant; that the said McCamant has not been a resident of the State of Washington for upwards of six years last past; that he is insolvent and has no property of any kind in this State; that F. M. Tull is and has been since the 23d day of July, 1888, unable to pay his debts. That said sureties on said bond did not justify, according to law; that said bond was not in double the amount of the defendant's estate, real and personal. That the estate of the plaintiffs, at the date of the said guardian's appointment, was of the value of $50,000 and upwards; that the inventory shows said estate to be valued at $35,000. That said order appointing P. D. Tull guardian was made by the said probate court without any compliance with section 1136, Hill's Code, volume 2, of the State of Washington, and of section 1612, Laws of Washington Territory, for 1881 and 1883. That said abstracts of title are imperfect, defective and not to be relied on in this, to wit: That they do not show that said guardian, after each of the sales of the defendant's real estate to F. M. Tull complied with section 1624, Laws of Washington Territory for 1881 and 1883, nor section 1143, Hill's Code, volume 2, and alleges that neither the proceeds of the said sale, nor the notes, nor the obligation, nor other security taken to secure the purchase-money at said sale were produced at the term of said probate court next after said sales, nor was there a report made by said guardian, and alleges that said sales and each of them were confirmed by said
probate court without compliance with said laws just above
524 mentioned. That said abstracts mentioned in defendant's
answer to the complaint and cross-complaint did not show the true state of the title of said property; that in so far as said abstracts of title state anything, all the fraudulent schemes of the defendants and the fraudulent acts and facts set out in defendant's cross-complaint fully appear.

By way of reply to the second affirmative defense of the German Savings and Loan Society to the complaint and cross-complaint, it is pleaded that the divorce mentioned in said answer was procured by fraud, practiced upon Lucy A. Tull. That no process was ever served upon her in said divorce action. That about the 1st day of May, 1887, F. M. Tull and Lucy A. Tull left the State of Kansas and never thereafter resided in said State. That just immediately prior to their departure from said State, and when in the act of boarding a railroad train, a person, to defendant unknown, handed Lucy A. Tull certain papers; that F. M. Tull, before his wife could read or examine the same, took said papers from Lucy A. Tull, saying that

he knew what said papers were for and that he would attend to the same. That Lucy A. Tull never thereafter saw said papers and never knew their contents until two months thereafter when she was informed that the same was a complaint against her containing an action for divorce commenced by F. M. Tull. That as soon as Lucy A. Tull discovered that F. M. Tull had secured a divorce from her in Kansas, she commenced an action in the district court of the Territory of Washington in and for the fourth judicial district, holding terms at Spokane Falls, on the 26th day of July, 1887, to recover from F. M. Tull an undivided one-half interest in the property described in defendant's cross-complaint, alleging that the same was community property of herself and F. M. Tull and that she be declared to be the owner of one-half thereof, and that said Tull had obtained a divorce from her by fraud, which said complaint in said action is set forth *in hæc verba*. That soon after said action was commenced, upon advice of counsel, the parties thereto came to a settlement and compromise upon the terms, 1st: That they should
525 remarry; 2d; Tull should acknowledge the claims made by Lucy A. Tull in her complaint to the property therein described, to wit: that said property was community property; 3d: that the divorce in Kansas, so far as the parties were concerned, should be declared null and void. That pursuant to said settlement and compromise said action was dismissed, the parties remarried and the property thereafter owned and enjoyed by said parties as community property and they shared and shared alike until after the death of Lucy A. Tull. That said F. M. Tull accepted the terms of the said settlement, fully understanding their scope and extent, and all his legal rights in the premises.

And for a further reply to the answer of the defendant, it was pleaded that on the 18th day of October, 1894, P. D. Tull, as guardian, was ordered by the superior court of this county to show cause why he did not make a report of his acts and doings as guardian. Said order was made at the instance of plaintiff, Dora May Dormitzer, and her husband. That the hearing of said show-cause order was, at the request of P. D. and F. M. Tull, continued until December 22, 1894. That at the time said show-cause order was sued out, October 18, 1894, the said Tulls, being insolvent and being unable to account for the money and property of the wards, and in order to avoid the settlement of their accounts in the superior court, offered to settle and compromise for a small percentage of the amount due and owing to plaintiffs and their brother, which offer was rejected, and thereupon the said Tulls, by duress and threats sought to compel plaintiffs and their brother to accept their terms of compromise, informing them that if they did not take what was offered as settlement, they would see to it that they got nothing out of the estate left by their mother. And thereupon the 10th day of December, 1894, F. M. Tull commenced an action in the superior court to declare the property in this litigation to be his separate property, and that the guardianship proceedings herein and every step taken therein was a mistake. That the
526 claims made by Tull in said action are false and fraudulent and were concocted by him to compel the plaintiffs and their

brother to accept the compromise and to cheat and defraud them of their property. That all the alleged facts contained in the German Savings and Loan Society's second affirmative defense were gleaned from said complaint of F. M. Tull, and up to December 10, 1894, F. M. Tull had always admitted said property belonged to himself and wife, and after her death that one-half thereof belonged to the plaintiffs and their brother. It alleges knowledge of those facts on the part of the German Savings and Loan Society; that all the matters set forth in the second affirmative defense of the German Savings and Loan Society have no foundation whatever, and are being employed pursuant to a conspiracy entered into heretofore by said German Savings and Loan Society to cheat and defraud the plaintiffs and their brother. It is alleged as a further reply that the defense stated in defendant's answer, the German Savings and Loan Society, did not accrue within two years before the filing of said answer, and for a further reply they deny each and every material allegation contained in the answer of the German Savings and Loan Society to the complaint and cross-complaint of plaintiffs and their brother.

Thereafter, on or about the 14th day of September, 1898, by leave of court, the said plaintiffs and the said guardian *ad litem* file further replies, which are to be construed as part and amendatory of the replies theretofore filed, the first of which denies all of the allegations of the first affirmative answer of the German Savings and Loan Society, except the allegation in regard to the giving of different mortgages mentioned therein, to the German Savings and Loan Society, and the foreclosure of the mortgages for $100,000 and for $20,000 and that the German Savings and Loan Society became the purchaser of the premises and is now in the possession thereof, pursuant to such foreclosure and purchase. And for reply to the second affirmative answer and defense set forth by the German Sav-
527 ings and Loan Society, admits the marriage of Lucy A. and F. M. Tull, March the 3d, 1870, but alleges that they were and remained husband and wife until the death of Lucy A. Tull on or about the 18th day of July, 1888, and denies having any knowledge or information sufficient to form a belief as to any and all of the allegations in the second paragraph of said amended answer and defense down to and including the thirty-second paragraph of said amended answer, and therefore denies the same. And for further reply to the second amended answer admits that F. M. Tull converted all his property in the State of Kansas into money and removed with it to the State of Washington, but alleges that said property had been so converted and the said F. M. Tull had established his residence in the State of Washington on or prior to January —, 1887. Admits the conveyance by James N. Glover on June the 17th, 1887, of the premises described in the complaint, beginning on the south line of Riverside avenue 90 feet east of the northwest corner of block 19, running thence east along said south line of Riverside avenue 60 feet, thence south 179 feet, more or less, to Sprague avenue, thence west along Sprague avenue 60 feet; thence north to the place of beginning. That on the 19th day of August,

1887, said Glover conveyed to F. M. Tull the property beginning at the northwest corner of block 19, thence east along the north line of said block 19, 90 feet; thence south at right angles with said north line 90 feet, more or less; thence westerly with the said north line 90 feet to the west line of said block 19; thence north along the said west line to the place of beginning. That the contract for the purchase of said last-mentioned property or premises was made and entered into between said Glover and Tull on the 28th day of December, 1886, and denies each and every other allegation in paragraph 3 of said affirmative answer and defense; denies knowledge sufficient to form a belief as to whether or not a divorce was granted between said Lucy A. Tull and F. M. Tull on the 20th day of May, 1887, or at
528 any other time, or at all; but on the contrary alleges that said Lucy A. Tull and F. M. Tull were and remained husband and wife from the time of their marriage until the death of the said Lucy A. Tull. Denies each and every allegation contained in paragraphs 5 and 6 of said second affirmative answer and defense. Denies knowledge sufficient to form a belief as to the matters alleged in paragraphs 7 and 8. Admits the commencement of the action by Tull on the 10th day of December, 1894, but denies knowledge as to whether the allegations are true.

For further reply it is alleged that the suit of F. M. Tull against Dora May Dormitzer *et al.* has by order of this court been dismissed.

F. M. Tull and Lucy A. Tull intermarried in 1871, in Missouri, and $100 would cover all the property the husband had at the time of his marriage. His wife had no property. They lived in Missouri a short time, and thereafter in Kansas until December, 1886, or January, 1887. The wife accumulated about $1,300 worth of property in Missouri. In Kansas the husband carried on the furniture business and accumulated quite an amount of property, real and personal. In the fall of 1886, for the purpose of changing location and residence, the husband sold out his furniture business and his real estate and, after settling up his business affairs in Kansas, he had about $25,000. This property was all accumulated through the business management of the husband in Kansas while the husband and wife were residing there with their family. In December, 1886, the husband came to Spokane Falls and contracted to purchase, for $10,000, from James N. Glover and wife, the property in controversy in this action. In June, 1887, a deed was executed by Glover and wife to the husband for part of this property. On the 19th of August, 1887, the remainder of the property in controversy was conveyed by Glover and wife under the contract to the husband. In May or June, 1887, the husband commenced to build on this property a business block. The first building erected was of brick, 50 by
529 100 feet, three stories high, and therein the husband opened up a furniture store. The building was finished in August, 1887. On the remainder of the property another expensive building was in the course of construction, the foundation and one story having been erected, when, on July 18, 1888, the wife died intestate,

at Spokane Falls, while living there with her husband and their children. The money from the Kansas property and the wife's money from the Missouri property and the earnings of the husband in the furniture business in Washington were applied to purchasing the said property, building the improvements thereon and in carrying on the furniture business at Spokane. At the time the wife died she left surviving her, issue of said marriage, three children, William L., then about fourteen years of age, Dorothy May, then about ten years of age, and Ernest B., then about four years of age. The plaintiffs, Dora May Dormitzer and William L. Tull, are two of these children of lawful age at the time this suit was brought, and Ernest B. Tull one of the defendants, is the other child, a minor at the time the suit was brought. Mr. Tull sold out his furniture business in Spokane in August, 1888.

On the 25th of February, 1887, the husband instituted against his wife a suit for divorce in the district court of Kingman county, Kansas. The facts concerning this suit are hereafter more fully set out. In July, 1887, the wife came with her children to Spokane Falls. On her arrival she immediately commenced a suit, in the district court of the Territory of Washington, at Spokane Falls, against F. M. Tull. Service of summons in this suit was made on F. M. Tull July 28, 1887. The complaint in that action alleged the marriage of the plaintiff and defendant in Missouri; the birth of the children; that during the first year of their married life they lived in Missouri, then went to Iowa and lived five years, and then to Kingman, Kansas; that the plaintiff had at all times conducted herself as a faithful wife; that the defendant, about the first of November, 1886, formed improper
530 relations with a servant girl in their employment, and conceived and commenced the execution of a plan by which to deprive plaintiff of her rights as his wife, and of her interest in the property, real and personal, belonging to the plaintiff and defendants; that he concealed said plan from the plaintiff, and that she did not know of the same until within a few days; that in pursuance of said plan the defendant pretended to plaintiff, and so informed her, that he would go to the State of California and select a place of business and home for the plaintiff and defendant; that he would thereafter return to Kansas and take the plaintiff and her minor children with him to the State of California to live; that in December, 1886, the defendant left his home in Kansas, came to Spokane Falls and entered into a contract for the purchase of real property (being the same real property in controversy in this action); and made preparations to move to Washington Territory, to live there and to engage in business there; that the defendant took said servant girl with him, but concealed the fact from the plaintiff and concealed from her the fact that he had gone to Washington Territory and purchased the property mentioned; that on or about the 8th of January, 1887, the defendant returned to the home of the plaintiff and defendant in Kansas and informed the plaintiff that he had been to the State of California, but concealed from the plaintiff that he had been to the Territory of Washington; that at this time

the plaintiff and defendant were owners of real property of the value of about $60,000, and of personal property of the value of about $20,000, situated in the State of Kansas; that this property was the common earnings and accumulations of the plaintiff and defendant during their marriage; that by the laws of the State of Kansas a married man could not sell and convey real property without his wife joining him in the deed of conveyance by which the same was to be conveyed; that in pursuance of the fraudulent plans of the defendant, and to deprive the plaintiff
531 of her rights in said property and of her position as a wife, the defendant falsely pretended to plaintiff that it would be for the best interest of the plaintiff and defendant to sell their property, and that if the plaintiff would join with the defendant in the sale and conveyance thereof he would take the plaintiff and her minor children and the proceeds of the said property and settle in the State of California, and reinvest the proceeds in property and business in the State of California for the benefit of the plaintiff and defendant; that the plaintiff believed these promises and representations to be true and made in good faith and relied upon the same, and by reason thereof, at the request of the defendant, joined with the defendant in the deeds and conveyances of said property, and the property in Kansas was sold by the defendant for the sum of $80,000, and the proceeds of such sale retained by him; that in pursuance of said fraudulent plan the defendant, on or about the 14th of February, 1887, prevailed upon the plaintiff to visit her father's home in Missouri, where she was to wait a short time when the defendant would come and accompany her to the State of California; that after the departure of the plaintiff, as requested, to her father's, the defendant traveled about with the said servant girl and passed said servant girl off as his wife; that about this time the defendant conceived the idea of kidnapping and taking from the plaintiff her two young children, then in the custody of her father in Missouri, and that in the absence of the plaintiff from her father's home, the defendant took the children to Des Moines, Iowa, where the plaintiff recovered them, and where the plaintiff found the husband living with said servant girl; that the husband then confessed his adulterous conduct with said servant girl, but promised the plaintiff that, if she would forgive him, he would thereafter live with her as a faithful husband and would reform his course of life; that on — about the 7th of March, 1887, the plaintiff and the defendant went to the city of Sacramento, at the defendant's request and
532 upon the representation that he desired to make California his home. The defendant then pretended that he had broken off all improper connection with said servant girl, but the truth and the fact was, as the plaintiff subsequently ascertained, the defendant procured said servant girl to go to the town of Cheney, Washington Territory, and to remain there until he, the defendant, could join her for the purpose of resuming his adulterous relations with her; that all this was unknown to the plaintiff until recently; that on the 18th of March, 1887, the defendant left the plaintiff at Sacramento, stating that he was going to Portland, Oregon, and

about the first of April the defendant came back to Sacramento with the said servant girl and compelled the plaintiff, by threats and pretenses, to allow the girl to remain with them; that the plaintiff at the time of the defendant's return was sick in bed and was among strangers and did not have the physical strength and will to assert her rights in the premises, and that the defendant and the said girl represented to her that no improper relations existed or would thereafter exist between them; that on or about the 11th of May, 1887, the defendant left plaintiff in Sacramento, California, to be gone for two weeks, pretending that he was going to Kansas for the purpose of settling up some unfinished business. The plaintiff alleged that the promises of good and virtuous behavior on the part of the defendant were made to her with the intention of deceiving her, to throw her off her guard and to prevent investigation upon her part into the conduct of the defendant, and was done with the fraudulent and dishonest design to procure a divorce from the plaintiff unknown to her and without serving of process upon her and with the intention to deprive her, not only of her position as a wife, but of all her interests in and to the real estate and personal property owned by them; that during all such times the defendant was keeping up improper relations with the said servant girl; that on or about July 5, 1887, the plaintiff, not having heard from her husband and having heard that he had taken up a residence at
533 Spokane Falls, left the State of California for the purpose of joining her husband at Spokane Falls; that the defendant had lived and cohabited with plaintiff up till about the middle of May, 1887, when he left her at Sacramento; that the defendant, after the plaintiff had left Kingman, Kansas, filed a pretended bill for divorce against the plaintiff, the grounds, nature and extent of which were unknown to the plaintiff; that the plaintiff had sent for the proceedings in said action and when she had procured a certified copy of the same, desired to make the same a part of the complaint; that plaintiff had had no notice of any such proceedings or a suit pending or determined till about the 15th day of July, 1887, when she was informed by a telegram from Kingman, Kansas, that a divorce had been granted. The complaint alleges that the plaintiff was entitled to own and control one-half of the property owned by the defendant; also to have her children supported and maintained out of the proceeds of the property. An injunction is prayed for to prevent the defendant from disposing of the property and the prayer is that the decree of divorce obtained in Kansas be set aside as fraudulent, that she be decreed to be the owner of one-half of the property, (being the property in controversy in this action), and that the husband be required to pay attorneys' fees and to provide for her support and the support of her family, etc. On the 30th of July, 1887, without the knowledge of the attorneys who brought the suit for the wife, the husband and wife signed a stipulation dismissing the action. The testimony shows that the husband and wife then agreed to a settlement of their difficulties. He testifies: "Well, we "simply agreed to fix up our past, our differences, and remarry, let "her have the interest in the property as she had had. * * * I

"say, we agreed to remarry *and she would withdraw the suit*, and she "should have an interest in the property, and there was no specific "amount she should have, that she should have the interest in the "property and settle up the business as man and wife
534 "*and the property be together.* That was all there was to it."

On the last of July, or first of August, 1887, F. M. and Lucy A. Tull went through the ceremony of remarrying, and continued to live together thereafter with their family in Spokane until Lucy A. Tull died, July 18, 1888. On May 8, 1888, F. M. Tull made application to the German Savings and Loan Society for a loan of $40,000 on part of the property in controversy. This loan was not perfected until after the probate proceedings hereinafter mentioned. This loan had been agreed upon but not consummated when Mrs. Tull died. This loan, as well as the other loans hereinafter mentioned, were negotiated as hereinafter stated. Mr. F. M. Tull first talked about this loan with Horace Cutter, cashier of the First National Bank of Spokane, in the spring of 1888. Mr. Cutter offered to secure the loan and said it would be from the German Savings and Loan Society. A week afterwards B. Goldsmith, of Portland, Oregon, came to Spokane to look over the property, and he made and delivered his application in writing to Mr. Goldsmith. Further facts as to the connection of Goldsmith and Cutter with the matter are set out hereafter. It is shown that, in December, 1889, J. M. Kinnaird prepared a certificate of title as to the Tull property, and had corresponded with Milton W. Smith, of Cox, Smith & Teal, and that Mr. Goldsmith was in consultation about that time with Mr. Kinnaird. Further facts as to Mr. Kinnaird's connection with the matter are hereafter set out.

On July 23, 1888, five days after the death of Mrs. Tull, P. D. Tull, a brother of F. M. Tull, filed in the probate court of Spokane county, Territory of Washington, a petition to be appointed guardian of the said children of Lucy A. Tull. The petition set forth the ages of the children and that said minors jointly owned in fee-simple an undivided one-half interest in the property in controversy in this action. The petition further stated that there was no guardian appointed by law, that the children had no relations in said county other than petitioner and their father F. M. Tull,
535 that the petitioner was the uncle of said minors, and that said F. M. Tull requested that the petitioner be appointed guardian of such minors. On this petition was the following indorsement, signed by F. M. Tull: "F. M. Tull having read the foregoing "petition says he is the F. M. Tull therein referred to and the father "of the minors therein mentioned, and requests that petitioner P. D. "Tull may be appointed guardian of said minors." On the same day an order was made by the court, appointing said P. D. Tull guardian of said minors, and the bond of said guardian was fixed at the sum of $9,600. Also on the same day the guardian filed his bond as guardian with said F. M. Tull and one McCamant as sureties thereon. The guardian qualified as such and letters of guardianship were issued to him on the 24th of July, 1888. On the 28th of July, 1888, the guardian made an inventory of the property of

his wards—the property in controversy—and filed the same in the probate court the first of August, 1888. On the first of August the guardian filed in said probate court his petition to be allowed to sell a part of the property in controversy. On the same day an order to show cause was made. On the 3d day of September an order was made by the probate court, directing said guardian to sell a portion of the real estate in controversy at public auction to the highest bidder for cash, after giving notice as required by law, and the guardian, before making said sale, was required to enter into a bond in the sum of $28,000, conditioned as provided by law. On September 24th this bond was filed, with one Jackson and the said F. M. Tull as sureties thereon, and the same was approved by the probate court. Notice of sale was given as required by law and the order of the court, and on November 26, 1888, the guardian made report to the said probate court that he had sold all the right, title and interest of said minors in part of the property in controversy in this action, at public auction, to the highest bidder for cash; that F. M. Tull bid the sum of $14,000 for the same, and that it was struck off to the said F. M. Tull for the
536 sum of $14,000 cash, he being the highest bidder and that being the highest bid therefor. The guardian asked that the sale be confirmed, and that he be directed and authorized, on his complying with the terms of the sale, to execute and deliver to the purchaser a deed therefor. On the 27th day of November, 1888, said sale was confirmed by the probate court, and on the same day the guardian executed to the said F. M. Tull a deed purporting to convey the interest of said minors in part of the property in controversy in this action, which deed was recorded in the auditor's office in Spokane county on the 30th of November, 1888. On the 6th day of December, 1888, the said F. M. Tull made to the German Savings and Loan Society his mortgage on the property described in the guardian's deed, for the sum of $40,000, and this mortgage was, on the 21st of December, 1888, acknowledged before the said J. M. Kinnaird, as a notary public, and filed for record in the auditor's office of said Spokane county, at the request of the First national bank. By a mortgage acknowledged the 6th day of March, 1889, F. M. Tull mortgaged the same property to P. D. Tull, as guardian of the said minors, to secure the sum of $14,000, which mortgage was recorded on the 8th day of March, 1889. On the 7th of March, 1889, the said guardian reported to the probate court of Spokane county—which report was approved and confirmed—that he had received the sum of $14,000 as proceeds of the sale of a portion of the real estate of said minors, under the order of the court, that he had invested the funds in the note of F. M. Tull for $14,000, dated March 1, 1889, due five years after date, with interest payable annually at the rate of ten per cent. per annum, and that the said note was secured by a mortgage executed by F. M. Tull on the property described in said guardian's deed to F. M. Tull. He petitioned that his action be confirmed and that the bondsmen be discharged and released from the obligation of the bond of the guardian upon the sale of said real estate. The court granted the order as petitioned

for, and discharged said bondsmen. In 1889 the buildings
537 situated on that portion of the property first deeded by the guardian to F. M. Tull and mortgaged to the German Savings and Loan Society for $40,000, were burned and out of the insurance money the $40,000 loan was paid back to the society, and a release and satisfaction of the mortgage was made to said respondent, which release was filed and recorded in the auditor's office of Spokane county on November 11, 1889. On August 12, 1889, the said guardian petitioned the court for the sale of the other portion of the property in controversy in this action, and in said petition referred to the inventory filed on the 31st of July, 1888. The petition describes the property petitioned to be sold, and recites that said minors owned an undivided one-half interest in the same jointly and equally with their father F. M. Tull, who owned the other half. The petition recites that a fire had destroyed the buildings on the property, that the minors had no property with which to rebuild, and that a better investment could be made by selling the property and investing the proceeds thereof in mortgage loans upon real estate in the city of Spokane Falls, or in such other real estate as the court might from time to time direct. This petition also recites that the real estate was incumbered by two mortgages, one for the sum of $10,000, due November 25, 1889, and the other to secure two notes of $5,000 each, payable to J. M. Glover; and further that there were insurance policies on the buildings when they were burned, sufficient to cover the first mortgage, but not sufficient to pay both thereof, and that the minors had no means to pay off all the mortgages. This petition and order to show cause was made on the 12th day of August, 1889; notice of the same was duly given, and on September 14, the court appointed A. J. Shaw as guardian *ad litem* of the said minors, for the purpose of appearing for and taking care of their interests in the proceedings. On the 14th of September, 1889, an order of the court directing the guardian to sell said property was made, and the guardian was required, before making such sale, to enter into
538 a bond in the sum of $40,000, conditioned as provided by law. This bond was filed the 25th of October, 1889, with F. M. Tull and one Fotheringham as sureties. On the 30th of November, 1889, the guardian reported to the court that he had offered said property for sale at public auction to the highest bidder upon the terms required by the court, that is for cash, and that he struck the same off to F. M. Tull for the sum of $20,000 cash, the said F. M. Tull being the highest and best bidder. The sale was confirmed by the court on the 10th of December, 1889, and the guardian was directed to convey the property to F. M. Tull upon his complying with the terms and conditions of the sale. On the 10th of December, 1889, such conveyance was made and the deed was filed for record in the auditor's office of Spokane county, on the 11th day of December, 1889. On the 26th day of October, 1889, F. M. Tull mortgaged to the German Savings and Loan Society, for $50,000, the property purchased by him at the first guardian sale and on which the mortgage for $40,000 had been given. This mortgage

was acknowledged before J. M. Kinnaird as notary public, and was filed for record in the auditor's office the 28th day of October, at the request of J. M. Kinnaird. On the 7th day of September, 1889, P. D. Tull, as guardian of said minors, executed a release of the $14,000 mortgage on the same property, in which he recited that the debt secured had been fully paid and discharged, and this release was filed for record on September 11, 1889, in the auditor's office of Spokane county. On the 30th day of December, 1889, F. M. Tull mortgaged a part of the property in controversy in this action to the German Savings and Loan Society for the sum of $25,000, and on the same day the same was filed for record in the auditor's office of said Spokane county. This mortgage is witnessed by J. M. Kinnaird. On the 31st day of December, 1889, F. M. Tull mortgaged to P. D. Tull, as guardian of said minors, all of the property, including his half interest, purchased at the first guardian sale, to secure the payment of $34,000, with interest at ten per cent.
539 per annum, according to the conditions of a promissory note made by F. M. Tull to said P. D. Tull as guardian of said minors. This mortgage was filed for record in the auditor's office of said Spokane county, on January 4, 1890. On the 7th day of April, 1892, a marginal satisfaction on the $34,000 mortgage, in the words following, was entered in the auditor's office of Spokane county, viz:

"This mortgage and note secured thereby fully paid, satisfied and "discharged this 7th day of April, 1892.

"P. D. TULL,
For the Heirs.

"[SEAL.]

"Attest:
"J. J. L. PEEL, *Auditor.*
"By W. H. HOSLER, *Deputy.*"

On the 20th day of May, 1892, F. M. Tull filed, in the auditor's office of said Spokane county, a release of the German Savings and Loan Society, of the $25,000 mortgage hereinbefore mentioned. On the same day he also filed in said auditor's office a release of said society of the $50,000 mortgage hereinbefore mentioned. On the 5th day of May, 1892, F. M. Tull gave to the German Savings and Loan Society a mortgage for $100,000 on all the real estate in controversy in this action, except sixty by eighty feet on Sprague avenue, which mortgage was filed for record in said auditor's office on the 5th day of May, 1892, at the request of Kinnaird & Happy. On the 23d day of May, 1892, F. M. Tull gave to the German Savings and Loan Society a mortgage for $20,000 on the sixty by eighty feet on Sprague avenue, which mortgage was witnessed by J. M. Kinnaird, and was filed for record by Kinnaird & Happy in the auditor's office of said Spokane county on May 23, 1892. The two mortgages, one for $100,000, and the other for $20,000, were foreclosed in the United States circuit court for the eastern district of Washington, and judgment rendered thereon for the full amount of said mortgages, with interest and costs, and thereafter, at the master's sale of

said premises upon said decree of foreclosure, the entire premises described in the pleadings in this action were sold to satisfy said judgment and decree of foreclosure, at which sale the German Savings and Loan Society became the purchaser and received
540 a certificate of such purchase from the master. The period of redemption provided by law has expired and the master's deed to the whole of said premises has been executed by the master in said cause to the defendant, German Savings and Loan Society. This deed has been approved and confirmed by the court and has been duly recorded in the auditor's office of Spokane county, and thereunder the German Savings and Loan Society ever since has been in the possession of the whole of said premises. In said action of foreclosure neither the plaintiffs in this action nor the defendant Ernest B. Tull were parties. In the probate proceedings Mr. Frank Graves, a reputable attorney of Spokane Falls, represented F. M. Tull and the guardian. He was examined as a witness in this cause and testified relative to the inception of the probate proceedings in part as follows:

"Direct examination.

By Mr. NASH:

Q. Your name and occupation, Mr. Graves?

A. Frank H. Graves; practicing lawyer.

Q. Were you in Spokane in the years 1888 and 1889?

A. I was.

Q. What was the style of your firm at that time, Mr. Graves?

A. Houghton, Graves & Jones.

Q. Do you remember a proceeding in the probate court entitled, 'In the matter of the guardianship of William L. Tull'?

A. Yes, I remember the Tull probate proceedings.

Q. I will ask you to examine these two petitions and say if you can in whose handwriting they are.

A. That is my handwriting; I can tell that from here.

Q. This petition is Plaintiffs' Ex. '9'; there appear to be interlineations upon this petition, Mr. Graves, in a handwriting other than your own. I will ask you to look at these interlineations and say, if you know, who put them on that paper.

A. I think I know. (Examining paper.) Yes sir.

Q. Who put them on?

A. J. M. Kinnaird, deceased.

Q. Who is J. M. Kinnaird?

A. He was a lawyer practicing here at that time and subsequently judge of this court.

Q. Explain how and under what circumstances and the facts fully as to why that interlineation appears upon the face of that petition.

A. Well, do you want I should recount the history of this proceeding and Judge Kinnaird's relation to it, and mine, or just answer categorically your question?

Q. You can state the facts leading up to the execution of that interlineation. Go on in your own way.

A. Some time in the year 1888, I suppose about the date that this petition was sworn to, some time before this petition was sworn to, Mr. F. M. Tull came to our office, whether to consult with me individually or not I don't remember; but after some consultation I did individually take charge of the matter. He represented to me me that he was building, had commenced that summer, which I knew of course, to erect a building upon his property, which we then knew as the Glover property; that for the purpose of erecting that building he had arranged to borrow money of the German Loan and Savings Society of San Francisco——

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Mr. HUGHES: The German Savings and Loan Society.

A. (continued). Well, it is this German institution that has been loaning money here. That he had already proceeded part way in the erection of the building, that the mortgage had not been executed when Mrs. Tull had suddenly taken ill and died; the mortgage being unexecuted, that the company had refused to accept an execution of the mortgage by him alone; that he could not go on with the building unless he got this money; that he was then indebted for material and labor in considerable sums of money and no way of liquidating that indebtedness, and that the property would undoubtedly be sacrificed. He desired to devise some way by which the property could be saved, both for his minor children and himself, and desired advice in respect of that matter. I subsequently did advise him. He also said to me that any proceedings that were taken would have to be subject to the approval of Mr. Kinnaird who, he said, represented the company.

Q. What claim, if any, did Mr. Kinnaird make?

A. Subsequently, Mr. Kinnaird—Mr. Tull employed me——

Q. Employed you?

A. Employed me, and subsequently Mr. Kinnaird called upon me; whether I saw him and mentioned it, or whether he came over to my office, I don't know, but anyhow, Mr. Kinnaird and I got together and I outlined to Mr. Kinnaird a plan that I thought would save the property, the children's interest, for them, and Mr. Tull's interest for him, and Mr. Kinnaird I discussed it with him and he approved of it and said that, as far as he was concerned he would pass the title. He either said at that time or said subsequently, that he would have to communicate it to counsel at Portland, or San Francisco, my recollection is now Portland, and that the counsel were Cox, Smith & Teal, but I won't be perfectly sure of that, and either at that time or at some subsequent stage of the proceedings, and I think at that time, proceedings were delayed until he was able to communicate with them, advise them of the nature of the proceedings that were to be taken, and receive a reply from them. Subsequently he did, he told me he had received a reply, and held in his hand what he said was a letter from the attorneys, while we discussed the thing at some length. Now, I don't know whether that was before any proceedings were taken, or whether that was at some stage in the proceedings, I don't know at all about that, but somewhere along there that was done. I then drew—had Mr. P. D. Tull

appointed guardian at the suggestion of Mr. Tull, and bond given, and then drew the petition which has been handed me (Pl'ffs' Ex. '9'), which was submitted to Mr. Kinnaird, and he made the interlineations that appear on the—well, all of the interlineations, I believe, that appear in it; at least these interlineations that appear on next to the last page, that were pointed out to me.

Q. Can you decipher the interlined words?

A. Yes sir; the words, 'or discharge the liabilities for labor and materials already placed thereon,' and the words, 'is in such condition that no rents can be derived therefrom and that the labor and materials placed thereon will be lost and said real estate;' he interlined those words. That petition was then filed and subsequent proceedings taken. That is hoe Mr. Kinnaird came to make those interlineations.

Q. I will ask you if, at the conclusion of every step in the probate proceedings Mr. Kinnaird expressed his approval or disapproval of the acts and the papers filed?

542 A. Oh, I don't know about that; Mr. Kinnaird was consulted by me as to every material step that was taken, but I don't suppose that I consulted with him, or that he expressly approved every detail of it. I think Mr. Kinnaird would have trusted me to carry out our plan, but Mr. Kinnaird knew what was going to be done, and knew what had been done after it was done, and approved of it.

Q. He was representing himself to be acting in the capacity of attorney for the German Savings and Loan Society?

A. Oh, yes, he had no other—when I say he represented himself, I don't mean—I am not sure that he ever said in so many words to me that he was the attorney for the company, but he was there in that capacity, professing to represent them. I understood he was representing them. He had no other business connection with it, except as the attorney, and I dealt with him as the attorney, and he dealt with me as Mr. Tull's attorney. Now, if you can understand how attorneys understand each other's relations without it being—I never put the categorical question to him, nor received the categorical statement, that I remember; I understood him to be representing them, and it was in that capacity I dealt with him; not otherwise.

Q. Do you remember the period that Judge Kinnaird occupied the bench in this county?

A. He was appointed some time in the spring of 1890, I think. My recollection would be soon after the legislature that year adjourned; anyhow it was that spring.

Q. And thereafter your firm then consisted of Senator Turner and yourself?

A. The firm from March, 1890, that I belonged to, was Turner & Graves; the firm of Houghton, Graves & Jones was dissolved on the first of January, 1890; the firm of Turner & Graves was organized in March of the same year; I was a free lance between those two dates.

Q. Your firm then became the attorneys for the German Savings and Loan Society?

A. Very soon after Judge Kinnaird went upon the bench we were retained by this company; I don't remember the legal corporate title of it. We acted as their attorneys until Judge Kinnaird retired from the bench, when he resumed—I think soon after he retired from the bench he became their attorney again. I want you to understand, gentlemen, all of you, that I don't wish to be held to too great accuracy of dates here.

Q. (Handing witness paper, Ex. '17.') Look at that; examine that instrument, Mr. Graves, and look at the signature of the notary, especially, and the witnesses on the other side.

A. Yes.

Q. Do you know anything about the execution of that paper?

A. What is it? (Examining.) No, I don't know anything about it. No, sir, I don't remember of knowing anything about it now. It might be that I did at the time; I hardly think so.

Q. What, if any, connection had Mr. Kinnaird with that?

A. I don't know, except what appears on the face of it.

Q. Is that his signature there?

A. It is his signature as a witness and as a notary public.

Q. (Handing witness paper.) Examine that paper.

A. Yes.

Q. Do you know Mr. Horace Cutter?

A. Very well, sir.

Q. What business was he engaged in in 1888 and 1889?

A. He was the cashier of the First National Bank of this city.

Q. Do you know anything about his agency of the German Savings and Loan Society?

A. Well, sir, I know this about it, I know that during this Tull business that my attention has been called to, Mr. Cutter was professing to act as the agent and I had consultation with him at one time with Mr. Kinnaird, possibly more than one time, but one time that I remember of. I know that Mr. Cutter came to us
543 before the receipt of this letter and desired to know if the German Savings and Loan Society could retain us to do their business, that subsequently we received this letter which you hand me, and that subsequently Mr. Cutter did bring the papers named in this letter, and that subsequently in our relations to the company as attorneys we dealt with Mr. Cutter as the company's agent; that is to say, that Mr. Cutter—I don't know whether he made the loan, but he always brought the loans to us, the abstract of title, and so on, for examination. Well, now, I don't want to be understood as saying that positively; my impression is that he would bring the abstracts to us; at all events, he consulted with us, and we dealt with him as the agent of the company in making a number of loans and doing the company's business. I can recall some of the loans now, but probably not all. I have not seen that letter since it was received, until just now.

Q. This is Plaintiffs' Ex. '22,' and is a petition for the sale. That is in your handwriting, also, is it not, Mr. Graves?

A. Yes, I can tell that from here. Those are the days when I could not afford a stenographer.

Q. In the sale of that piece of property you followed the same steps and the same proceedings as you followed in the sale of the first piece, did you not?

A. Well, I presume so, Mr. Nash; I expect, having once blazed out a successful trail, that I did not establish a new one, but I would not want to answer that positively; I think so.

Q. Did Mr. Kinnaird have the same connections with that sale of that piece of property as he had with the first one, do you remember?

A. In a general way, yes; of course, Mr. Kinnaird said to me, just to put it through the same as you did the first one, and I got through it.

Q. I hand you Plaintiffs' Ex. '35' and Pl'ffs' Ex. '38,' and ask you if you know anything about Kinnaird's connection with those papers, and in what capacity he acted when those mortgages were executed.

A. I know nothing except what appears on the face of the papers; that is, of the first one. I will look at the other one (examining paper); I know nothing about it, except what appears on the face of the papers; this is Mr. Kinnaird's signature here; I know his signature. Mr. Kinnaird's signature to both of them, where it purports to be, both as a witness and one as a notary; that is all I know about that, except by hearsay.

Cross-examination.

By Mr. HUGHES:

Q. Mr. Graves, you say that when Mr. Tull employed your firm the matter came into your hands and you took charge of the conduct of these proceedings?

A. Yes sir.

Q. Your negotiations, or your conferences—I mean the conferences of your firm—were had on your part as a member of the firm and with Mr. Tull?

A. Yes, after the first consultation, at least; I don't remember about the detail of the first conversation, but I took charge of the business, anyhow.

Q. Now, you say that Mr. Tull explained to you the situation of his property, the fact that the loan was pending and uncompleted at the death of his wife, that the building was in course of construction, and there were claims that would result in mechanics' liens and in the ultimate sacrifice of the property, unless the loan could be consummated, and that he was advised it could not be consummated without some proceedings taken to make complete title to the property?

A. Yes—now——

544 Q. (Interrupting.) And give the loan company, the German Savings and Loan Society, a first mortgage upon the property, in pursuance of the original application?

A. Yes sir. I want to say, in that connection, Mr. Hughes, with your permission, that I suggested to Mr. Tull the question as to whether it really was community property or not, the money having been brought here from another State; I knew of no other reason why it was not community property, except the reason that the money was brought from another State—that question that you probably heard mooted—but that was disposed of without any consideration, because the mortgage company would not take title with any doubt of that sort; they had to have a clean title, hence Mr. Tull and Mr. Kinnaird both conceded at the outset it to have been community property, and the children to have a one-half interest in it, hence, I commenced with that assumption.

Q. You mean, it was conceded for the purpose of getting this loan?

A. No, it was conceded—well on the part of Mr. Tull, conceded for that purpose; I suppose of course that Mr. Kinnaird had no—did not care whether it was or not; he was not going to take any chances; but it was assumed by all parties to be community property hence, I gave myself no concern to that question, and did not inquire into any precedent facts. I started with the assumption that it was community property; Mr. Tull said he did not care much whether it was or not; he was perfectly willing that the children should have their interest in it, in any event, and I want to say, too, Mr. Hughes, with your permission, that when Mr. Tull employed me he said he employed me on behalf of himself and of the children, likewise, and I conceived there was no conflict between their interests.

Q. Now, why did you conceive there was conflict between their interests? I ask that question for the purpose of determining the motives prompting these proceedings, and the course of the conduct of them, as to whether there was any fraudulent purpose connected with it.

A. Well, there certainly was not, on my part, nor none that I even suspected on the part of Mr. Tull; I am satisfied from what I knew then and now, that there was none. The reason why I conceived there was no conflict was this: the children took Mrs. Tull's place in the property; their interest was an undivided one-half, and so was Mr. Tull's; their interests were identical; Mr. Tull had no money to go on with the building, neither had the children. Owing to what I conceive to be the power of a guardian under the law as it then was, I don't know what it is now, it was not within the power of a guardian, even with permission of the probate court, to make a mortgage; a mortgage had to be made after title passed into Mr. Tull. Mr. Tull was willing that the property should be sold in advance, testifying before the probate court that he would bid what its fair valuation was. Its fair valuation was established before the probate court by disinterested testimony, and I don't remember what it was, but I know that I considered at the time it was the fair value of the property, and I conceived, therefore, that there was no contest or conflict in his interests, and that of the children.

Q. Was that valuation the price actually paid or bid at the sale?

A. Yes.

Q. Was it at that time, explained and made known to the court what was the character of the proceedings, and for what purpose they were inaugurated or instituted, and how they were to be carried into effect?

A. The probate court fully understood the situation from first to last, and the means and the end in view; absolutely nothing concealed *from him; the fullest explanation* was made to him; the petitions themselves are a pretty full explanation of the situation and the purpose, and it was further explained to him, the further
545 steps of it were explained to him by testimony, and by a statement of counsel; they were not incorporated into the record because they had no place there; there was the testimony which was not preserved, the evidence upon which the court acted.

Q. Was the money actually paid by Mr. Tull, at this time, and the time of this purchase?

A. Personally I do not know; I mean, I do not know in the sense that I either saw it paid or know of my own knowledge, except what was told that it was not paid, but I do know, so far as I can know a thing of that sort, that it was not.

Q. You understood that fact in the prosecution of these proceedings?

A. Yes sir.

Q. What was the arrangement that was made in respect of that?

A. The advice which I gave Mr. Tull and the guardian, and the explanation which I made of it to the probate court was that Mr. Tull was perfectly good; if he was not, the bond of the guardian, Mr. P. D. Tull, was perfectly good for that money, until the first mortgage should go on and a second mortgage then be placed on to secure that money, and that course was taken with the knowledge and consent of Mr. Tull, the guardian, Mr. Kinnaird and the court Judge Hartson being the probate court, and the second mortgage was subsequently put on. The property by everybody was considered of very much more value than both mortgages; the second mortgage at that time being considered very good security.

Q. It was explained to the court that the mortgage to be given was to be a second mortgage, but was to cover the entire estate?

A. Yes sir, the court understood that perfectly; I am told by Mr. Happy that the record don't show it was to be a second mortgage.

Mr. HUGHES: I think the record is silent upon that.

The WITNESS: I can't understand that, because it was thoroughly understood by the court and all of the parties, that it was to be first. The petition on its face says that the object of this was to give a first mortgage to your client—no other object in these proceedings.

Q. The same was true of the second petition and sale, and the subsequent mortgage taken in pursuance of it, was it. The second petition was after the fire, after the buildings were all burned down?

A. My recollection fails me when I come to that second proceeding; I don't remember much about it. I remember there was a second proceeding, and I see a petition for it, or what is stated to be

the petition for it, is in my handwriting, and that is about all I remember of it. Perhaps if my attention was called to the details I might recall.

Q. The second petition asks the court on similar grounds, to direct sale of the remaining property.

A. I don't want to speak about that until I read the petition, with your permission.

Mr. HUGHES: Yes, I would like to have you read the petition.

The WITNESS (examining petition): This is a different piece of property from the first, isn't it?

Q. Yes, the first is a part of the property bought of Glover, and this was the balance of it when he was making the larger building, the building after the fire.

A. I can't recall much about the second proceeding than what appears on the petition now. My attention had not been previously called to it.

Q. Your best recollection would be that the same course was pursued in respect to it?

A. I should presume so, yes, but I can't remember whether the——

Q. (Interrupting.) I will ask you whether there was anything concealed from the court regarding this petition, either with respect to what was to be done——

A. (Interrupting.) Well, I can answer that very fully, that there was not, at least if I put it through there was not.

546 Q. That is in your handwriting?

A. This is in my handwriting, and if I put it through there was nothing concealed, I warrant that; I was not engaged in any fraud on any minors, nor to the court; I will tell you that, and I did not think that Mr. Tull was, and don't think he was yet.

Redirect examination:

Q. The facts that are set forth in that petition, Mr. Graves, however, you got entirely from Mr. F. M. Tull, is that not a fact?

A. In this second petition?

Q. No, in the petition you relied upon him for the facts contained therein?

A. Why, in the main, yes.

Q. Mr. P. D. Tull had very little to do with the proceeding, as a matter of fact?

A. That is my recollection of it; after he was appointed guardian Mr. P. D. Tull used to consult me and was very solicitous, but I don't know—he said he didn't want to get into any trouble with it, and did not want to do anything but what was right. He came up and talked with me about it several times—I don't remember—I don't think that he knew at first hand the facts. On the hearing before the probate court we examined a number of witnesses to establish the facts alleged in the—that is, the first one I remember distinctly about the hearing, remember where the office of the court was, and could recall, I think, some of the witnesses who were examined.

Q. The witnesses were all produced by Mr. Tull, however, were they not?

A. I expect that Mr. Tull got the evidence for me. I am sure I did not go out on the street and rustle it up. Somebody did it and I expect it was Mr. Tull.

Q. You were paid for your services and employed by Mr. F. M. Tull, were you not?

A. I was employed by Mr. F. M. Tull, and my present recollection is that Mr. F. M. Tull paid me, but from what source he got the money I don't know. When I say he paid me, I would not be understood as meaning thereby whose money it was; my present recollection is that Mr. Tull gave me a check or something. I know he paid me anyhow, but don't know whose money it was he paid me with.

Recross-examination:

* * * * * * *

Q. Do I understand you to say, Mr. Graves, that the facts presented to you at that time were obtained entirely from Mr. Tull, or were they within your knowledge?

A. A great many of them were within my knowledge. I knew where the property was, I knew what the property was worth, that is approximately; I knew that Mr. Tull was building; I knew that from Judge Kinnaird about the negotiations with the loan society; I knew of Mrs. Tull's death; I knew the things were hung up in midair awaiting the getting of this money.

Q. Did you know the witnesses that were examined before the probate judge?

A. Oh, and so did he. Spokane was a small town then; everybody knew everybody else.—I want to say, with the permission of counsel, I don't think I had anything to do with this second proceeding, except drawing this second petition. Did I, Mr. Nash?

Mr. NASH: No, sir, I think that is where your work in the case ended, with the drafting of the petition.

547 The WITNESS: I have no recollection of what took place in the beginning, or anything else in this second petition. In view of some comments I have heard made by counsel here, I want to make my position there, with permission of the court, clear, state it a little more clearly. It was this, that the property belonging to both Mr. Tull and Mrs. Tull, in her lifetime, after her death and her interest going to the children, it could be made available only by putting a mortgage upon it to complete that building, either to this company or some other company. The only (way) that it could be done under the law, as I held, and Mr. Kinnaird agreed with me, was by the sale of the property; the guardian could not mortgage.

(By Mr. HUGHES:)

Q. You mean a probate sale?

A. A probate sale. Mr. Tull desired that a guardian should be

appointed with authority to join in the mortgage. That could not be done under the law as it then stood. I don't know whether it could be done now or not. Therefore, a probate sale was ordered, at a fair price for the property. The children took a second mortgage as representing their interests, thus holding it subject to the mortgage to the German Savings and Loan Society, and Mr. Tull took the property subject to the second mortgage. The arrangement was considered by all parties advantageous, and if it had not been for the administration of Cleveland and some things like that, some things that subsequently followed, it would have been advantageous."

P. D. TULL, the guardian, testified in part, as to his connection with the probate proceedings, as follows:

"Q. Who employed Mr. Graves, or his firm, to conduct that proceeding for you?
A. I don't know who employed them; I did not.
Q. You did not?
A. I did not, sir; no sir.
Q. Who paid him for it?
A. That I don't know.
Q. Then, of course, you did not?
A. No sir, I did not.
Q. Now then, about the same time and soon after you were appointed guardian, what if anything did you do or was done in your name in reference to selling real estate?
A. I believe the property was sold; that is my recollection of it.
Q. Do you remember, or do you not, whether a proceeding in the probate court was had to secure a sale of a part of that property?
A. I think it was, yes sir.
Q. *What* was that, with reference to the time of your appointment?
A. I think that was after the time I was appointed; just the time I don't know.
Q. Now, there was a sale under that?
A. Yes sir.
Q. Who were the attorneys in that proceeding on your behalf?
A. I think Judge Houghton was the attorney, if I remember rightly.
Q. I am speaking of the first proceeding, Mr. Tull. It was Houghton, Graves & Jones, was it not, the firm?
A. I think that is the firm name. I know Houghton was connected with the firm.
Q. Do you remember the occasion of the sale?
A. I remember the sale being made.
Q. Where was the sale made?
A. On the grounds there, at the corner of Riverside and Stevens.
Q. Who was present at the sale?
A. I remember that—I don't remember any one except Judge Houghton, myself and my brother, I think were present.

548 Q. How was the sale conducted?
A. At auction.
Q. Offered at the highest price?
A. Yes sir.
Q. Who were the bidders?
A. F. M. Tull.
Q. What amount did he bid for the property?
A. My recollection is it was $20,000; I am not positive as to that.
Q. You remember that there were two sales, don't you, Mr. Tull?
A. I remember very distinctly the first sale. The second sale I don't remember what time, nor where it occurred.
Q. You don't remember the amount that was paid?
A. My recollection is it was $20,000; I would not be positive.

(By Mr. HAPPY:)

Q. You are speaking of the first sale now?
A. Yes sir.
Q. How was the purchase price to be paid?
A. In a mortgage, I believe; paid in a mortgage.
Q. What was the announcement made, what were the terms announced?
A. Cash.
Q. Was there any cash paid to you at that time?
A. No sir.
Q. Do you remember when that was?
A. No sir. What year?
Q. Yes.
A. No; I think it was in 1889; that is my impression.
Q. Was there ever any money paid to you at any time on account of that sale?
A. There never was, no sir.
Q. What, if any, security did you take for it?
A. I had a mortgage; I believe there was a mortgage given me.
Q. A mortgage given you?
A. I believe there was.
Q. Do you remember when that mortgage was given?
A. About the time, or shortly after the time, a sale was made.
Q. How long after?
A. I don't have any recollection. I should judge it was very soon afterwards.
Q. Did you afterwards execute a release of that mortgage?
A. I think so.
Q. (Handing witness paper.) I show you Plaintiffs' Ex. No. '18.' Is that a mortgage taken by you on the first sale?
A. Yes sir.
Q. This was taken by you at the time it bears date, was it not?
A. Yes sir; I think it was.
Q. This is the first mortgage. Do you remember when you executed a release of it?
A. No sir, not the date.

Q. At the time that you executed the release, was there any money paid to you on account of it?

A. There was not.

Q. Or to anybody for you that you know of?

A. No sir.

Q. What if any money was ever paid you by F. M. Tull, or by any one for him, upon account of the purchase price of the first sale of real estate?

A. None.

Q. Do you remember the property which you sold at that time distinctly, so you can tell what it was?

A. Not the boundaries of it. I know where it was situated, on the corner of Riverside and Stevens, but the boundaries I don't know.

Q. Do you know whether or not all the property which your brother owned in that block at that time was sold at that time?

A. No sir, not positively, I do not.

Q. Only a part of it?

A. My impression is it was only a part of it.

Q. State whether or not you afterwards made an application to the court to sell the remainder of the property, or there was a proceeding made.

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A. I suppose if there was such a proceeding on record, that I did, but I have no recollection of it.

Q. You have no recollection of it?

A. No sir.

Q. Do you know what attorney or firm of attorneys conducted that proceeding?

A. I do not, no sir.

Q. Do you remember making a sale in another proceeding?

A. No sir, I don't remember. I remember posting the first sale, but the second sale I don't remember at all the circumstances attending it.

Q. You were all the time acting as guardian for those children?

A. I suppose so.

Q. You were their general guardian?

A. I suppose so.

Q. If you made a second sale, did you ever, at any time, receive any part of the purchase price in cash?

A. I know I never received any money of any kind at any time.

Q. At any time?

A. No sir.

Q. On account of your guardianship?

A. No sir.

Q. Did you or did you not know about the various defects in these proceedings as they were taken, what was being done?

A. I knew very little about it.

Q. Who directed these proceedings on behalf of the children mostly?

A. Why, F. M. Tull.

Q. In fact, Mr. Tull, what, if anything, did you do, or what if

any direction did you exercise over these proceedings and over the sale of this real estate?

A. I did not do anything, only as directed by F. M. Tull.

Q. Then, Mr. Tull, as a matter of fact you don't remember very much about it?

A. That is right, very little about it, sir.

Q. Who besides yourself, so far as you know, and F. M. Tull, exercised any authority or direction over the matter?

A. No one, to my knowledge.

Q. (Handing witness paper.) Look at that paper and see what it is. Did you ever see that before?

A. It looks very much like a note that I had at one time, or a copy of it.

(By Mr. HAPPY:)

Q. A note that you had at one time?

A. Yes.

(By Mr. MURRAY, resumed:)

Q. Where is the original of that, do you know?

A. I think I have got the original, I am not certain.

Q. You think you have it?

A. Yes, sir, I think I have it; I don't know whether it is the original of that or not. I have a note here of some kind.

Q. If you have, pass it up and let me see it.

A. (Handing counsel paper.) This is the original, I think.

Q. This is the original note?

A. Yes, sir, I think it is.

Q. Has that been in your possession for some time?

A. Yes, ever since.

Q. What is it, what was it given for?

A. My understanding is it was a mortgage note. That is the note, and there was a mortgage for $34,000 with the note.

Q. A mortgage for $34,000 with the note?

A. Yes, sir; that is the note.

Q. Do you remember executing a release of that mortgage?

A. No, I don't remember.

Q. You don't remember whether you did or not?

550 A. No, sir, I do not.

Q. Did you ever receive any money on that note and the mortgage covering it?

A. Never did, no sir.

Q. At no time?

A. At no time.

Q. If you did release it then at all, state whether or not it was for any consideration; the release was given as coming to you on behalf of the minors?

A. No consideration.

Q. Mr. Tull, what if any accounting did you ever make of your guardianship?

A. I never made any.

Q. Mr. Tull, what attention, if any, did you pay to any of these proceedings to sell real estate in the probate court?

A. I paid none.

Q. You paid none?

A. Very little, if any.

Q. Did you at any time ever employ or pay the attorneys who conducted it?

A. I did not, no sir.

Q. What, if anything, did you do aside from the sale of this real estate, in the matter of the guardianship over these children?

A. Nothing that I have any recollection of now.

Q. What, if anything, did you ever do in reference to the care of their person as distinguished from their property?

A. Nothing.

Q. What, if any estate ever came to your hands on that account?

A. How is that?

Q. What, if any, money or property ever came to your hands on their account?

A. Nothing, aside from this mortgage."

The property in the first sale, in May, 1888, was valued by Goldsmith at $50,000, and, exclusive of improvements made and in course of construction, at $20,000. Property kept increasing in value and in August, 1889, the same property, exclusive of improvements, was valued by Mr. Goldsmith at $100,000. The value in the fall of 1888, placed upon the property by witnesses for appellants, was $75,000. Witnesses for the respondent place a value of not less than $50,000 and as high as $57,500. The property in the second sale was of the value, according to the testimony, of not less than $60,000. No letters of administration on the estate of Lucy A. Tull were ever taken out or applied for. Mr. Cutter and Mr. Kinnaird, referred to in the testimony, were both dead when the same was taken. The deeds from the guardian to F. M. Tull refer to the orders of the court under which the sales were made and make the same a part of the deeds by such references.

551 The respondent claims that the complaint in this action is to foreclose the mortgages therein mentioned, and that the probate proceedings, by which title to one-half the property in controversy passed from the minor heirs to F. M. Tull, under whom respondent claims, cannot be questioned because the same would be a collateral attack. The complaint in apt and specific allegations attacks directly the probate proceedings and the guardian deeds thereunder. On these allegations issues were joined by the respondent. It is true that the plaintiffs pray for a foreclosure of the mortgages, but they also pray for relief generally. Under the old chancery practice it has been held that the true character of a bill must be determined by the material averments; and if it appears therefrom that the plaintiff is entitled to relief, and the prayer will admit of that relief being given to which the plaintiff shows himself to be entitled, the court will grant such relief, even if the bill be given a wrong name.

McConnel *v.* Gibson, 12 Ill., 128.

Under a general prayer in a bill for a specific performance, held that rents and profits might be granted, any relief may be given for which the basis is laid in the bill.

Watts *v.* Waddle, 6 Pet., 389.

Where the plaintiff shows that he is entitled to some relief, such relief will be given as the case made out in equity demands, and as is consistent therewith.

Danforth *v.* Smith, 23 Vt., 247.
Driver *v.* Fortner, 5 Port. (Ala.), 9.

Although the special relief asked may not be allowed, yet the court will, if possible, grant such relief as the allegations will support, in order to meet the demands of justice between the parties; so where a bill asking for an assignment of a mortgage was not allowed, yet the court, upon certain averments in the bill, sustained it as a bill to redeem.

Lamson *v.* Drake, 105 Mass., 564.

552 Although the prayer for special relief may be defective, relief will be granted under the general prayer, consistent with the equities of the case.

Treadwell *v.* Brown, 44 N. H., 551.
May *v.* Lewis, 22 Ala., 646.
Strange *v.* Watson, 11 Ala., 324.
Townshend *v.* Duncan, 2 Bland. (Md.) 45.
McMillan *v.* James, 105 Ill., 194.

It was held in Owings' case, 1 Bland. Ch. (Md.) 370, that it is not essentially necessary that relief should be granted exactly or in part as prayed in the bill, but that affirmative relief might be granted upon the equities of the case as made out from the pleadings and proofs between the parties.

Johnson *v.* Johnson, 1 Munf., (Va.) 549, note.
The Charitable Corporation *v.* Sutton, 2 Atk., 406.
Walker *v.* Preswick, 2 Ves., 622.
Taylor *v.* Ficklin, 5 Munf. (Va.) 25.
McNeil *v.* Baird, 6 Munf. (Va.) 316.
Fife *v.* Clayton, 13 Ves. Jr., 546.
Higgenson *v.* Clowes, 15 Ves. Jr., 516.
Dorsey *v.* Campbell, 1 Bland. Ch. (Md.) 356.
Harding *v.* Handy, 11 Wheat., 103.
Stuart *v.* Mechanics', etc., Bank, 19 John. (N. Y.) 496.

It has been held, however, that under general prayer relief may be granted adapted to the case made by the bill, although it be inconsistent with the special prayer.

Eureka Marble Co. *v.* Windsor Mfg. Co., 47 Vt., 430.
Dews *et al. v.* Cornish, 20 Ark., 332.

Our practice under the code has not restricted, modified or attempted to abridge the liberality of the old proceedings in granting relief of any and all kinds warranted by the pleadings and proof

The decisions of this court, in harmony with the provisions of our code of practice, establish the rule that if the plaintiff sets forth facts constituting a cause of action, notwithstanding he has misconceived his remedy, he is entitled to the relief the facts warrant.

Jackson *v.* Tatebo, 3 Wash., 456.
Carl *v.* West Aberdeen Land, etc., Co., 13 Wash., 616.
Damon *v.* Leque, 14 Wash., 253.
Watson *v.* Glover, 21 Wash., 677.

The complaint is drawn with a double aspect and will justify
553 a decree restoring the mortgages wrongfully cancelled, and their foreclosure, or a decree adjudging the guardian's sales and deeds void and giving to the children an unincumbered one-half interest in the property. We do not think that by presenting their cause of action in this way the plaintiffs have definitely adopted one or the other remedy, and hence cannot be said to have waived the fraud in the guardianship sales as contended for by the respondent. The respondent further claims that, under § 6474, 2 Bal., the guardian's sales set out in the complaint and the deeds made in pursuance thereof are cured as against all the grounds of the complaint urged by the plaintiffs. This section reads:

"In case of an action relating to any estate sold by an executor, administrator, or guardian, in which an heir or person claiming under the deceased, or in which the ward or any person claiming under him, shall contest the validity of the sale, it shall not be voided on account of any irregularity in the proceedings: Provided, it appears,—

1. That the executor, administrator, or guardian was ordered to make the sale by the probate or superior court having jurisdiction of the estate;

2. That he gave a bond which was approved by the probate or superior judge, in case a bond was required upon granting the order;

3. That he gave notice of the time and place of sale, as in the order and by law prescribed; and

4. That the premises were sold accordingly, by public auction, and the sale confirmed by the court, and that they are held by one who purchased them in good faith."

It will be observed that this section applies only when the lands are held by "one who purchased them in good faith." One who participated in the fraud as charged in the complaint in this action, or who knew or had the means of ascertaining by the exercise of common prudence that a fraud had been perpetrated in the sale of the property, is not a purchaser in good faith. Want of notice or of the means of knowing is an essential element of good faith. As expressed therein, this section should be construed as applying to mere "irregularities" in the proceedings where the good faith of the probate proceedings is not impeached, but it cannot be held to apply where those proceedings are assailed on the ground of fraud from their very inception. The respondent claims that by operation

of the decree of divorce under the laws of Kansas, which decree was obtained in the suit of F. M. Tull against Lucy A. Tull,
554 the wife (and those claiming under her) are barred of any claim in or to the property of the husband, and that the property in controversy was purchased with money of the husband owned by him at the time of such divorce. To sustain this defense it has introduced in evidence certain laws of Kansas, together with a record of said divorce proceedings authenticated as required by the laws of the United States. It is provided by the laws of Kansas that:

"A divorce granted at the instance of one party shall operate as a dissolution of the marriage contract of both and shall be a bar to any claim of the party for whose fault it was granted in or to the property of the other."

The appellants, however, claim that this divorce was void because the court in Kansas had no jurisdiction to grant the same. We have held in the case of Trowbridge *v.* Spinning, decided August 25, 1900, that, as to the question of jurisdiction arising under the Constitution of the United States, which provides that "full faith "and credit shall be given in each State to the public acts records "and judicial proceedings of every other State," we will take judicial notice of the laws conferring jurisdiction on the courts from which such records come, when such records and judicial proceedings are sought to be given effect in this State. The laws of Kansas, when the complaint in the said action for divorce was filed, required that the plaintiff must have been an actual resident in good faith of the State for one year next preceding the filing of the complaint, and be a resident of the county in which the action is brought at the time the complaint is filed. The supreme court of Kansas has decided that the words "resident" and "actual resident," as used in this statute contemplate a residence and actual residence with substantially the same attributes as are intended when the word "domicile" is used.

Carpenter *v.* Carpenter, 30 Kan., 717.

"The difficulty of defining accurately the term 'domicil' is generally conceded by both the courts and the text writers. The following definition, framed by an eminent authority, has, however, been frequently approved, and is probably the best that can be given. 'In a strict and legal sense, that is properly the domicil of a person where he has his true, fixed, permanent home and
555 principal establishment, and to which, whenever he is absent, he has the intention of returning.'"

10 Am. & Eng. Ency of Law, 2d ed., 7, and cases cited.

And in note, Kent's definition:—"The place where a man carries "on his established business or professional occupation, and has a "home and permanent residence, is his domicil."

2 Kent's Com., 431.

And in note: "The Roman codes described domicil as follows: "'In whatever place an individual has set up his household gods

"'and made the chief seat of his affairs and interests; from which,
"'without some special avocation, he has no intention of departing;
"'from which when he has departed, he is considered to be from
"'home; and to which, when he has returned, he is considered to
"'have returned home. In this place there is no doubt whatever
"'he has his domicil.'"

White *v.* Brown, 1 Wall., Jr., (C. C.) 262.

Ordinarily the authority of an attorney to appear for the party whom he professes by the record to represent is presumed, but such presumption may be overcome by any evidence extrinsic as well as intrinsic. On the 25th day of February, 1887, Frank M. Tull filed in the district court of Kingman county, Kansas, a petition for a divorce from his wife, Lucy A. Tull. The plaintiff alleges his marriage to have been on the 3d day of March, 1872, *at the residence of the defendant's parents in Harrison county, Missouri*, and alleged also "that the plaintiff *now is* and has been a resident of Kingman "county and the State of Kansas for the period of eight years imme-"diately preceding the commencement of this action." He also alleges the issue of the marriage to be three children, William L., aged 13, Dora M., aged 9, Benjamin, aged 4. He also alleges that at various places and on numerous and divers occasions the defendant had committed adultery with many persons whose true names were unknown, and that particularly on or about the —day of September, 1884, at the city of Kingman in the State of Kansas, in the dwelling
556 of the plaintiff, the defendant did commit adultery with one Richard Roe, whose true name is unknown, and that all such acts of adultery were without his consent, etc., and that he had not voluntarily cohabited with the defendant since he had known of the commission of the acts complained of. With the record is a præcipe, dated February 25, 1887, entitled in the case, directing the clerk of the court to issue summons in the action, for said defendant, directed *to the sheriff of Harrison county, Missouri*. In the record also is an alias summons from the State of Kansas to the sheriff of Sacramento county, State of California, commanding him to notify Lucy A. Tull that she had been sued by Frank M. Tull in an action for divorce in the district court within and for the county of Kingman, Kansas, and that unless she answered by the 10th day of June, 1887, the petition of the said plaintiff against her filed in the office of the clerk of said court, said petition would be taken as true and judgment rendered accordingly. This writ is tested March 23d, 1887. Upon this writ is a return as follows:

"STATE OF CALIFORNIA, } ss:
County of Sacramento, }

Received this writ this 2nd day of April, 1887, at 9.30 o'clock, a. m., and as commanded by this writ, I summoned the within-named Lucy A. Tull on the 2nd day of April, 1887, by delivering to her a certified copy of the within summons and of the indorsements thereon; and I summoned the within-named Lucy A. Tull as above stated on the 2nd day of April, 1887, at the city of Sacra-

mento, State of California, in my county. Dated Sacramento, Cal., April 2, 1887.

M. M. DREW,
Sheriff of Sacramento County, State of Cal."

The record further shows that on April 19, 1887, what purported to be an answer in the case, in the words following, omitting the title, was filed:

"Now comes the above-named defendant and for answer unto said plaintiff's petition herein filed says: She denies each and every allegation in said petition contained.

LUCY A. TULL,
By J. W. HUGHES,
Her Attorney."

The decree in the cause, as shown by the record, omitting the title, is as follows:

"Now on this 9th day of May, A. D. 1887, the same being a day of the regular May term of the said court, this cause coming on for trial and final decree, and it appearing to the court now here that said defendant has been *personally* served with the process
557 of this court in this cause, and the said defendant having appeared and answered herein and now at this time the court having heard the testimony of the witnesses herein, considered the same, it is found by the court that the said defendant, Lucy A. Tull, has been guilty of the several acts of adultery in plaintiff's petition charged. It is therefore considered, ordered and adjudged and decreed by the court now here that the bonds of matrimony existing between the complainant and the defendant be dissolved and annulled and for naught held, and that each of said parties be henceforth free to marry again as if said marriage relation had never existed between said parties."

We have set out all this divorce record except a præcipe for two witnesses on behalf of the plaintiff, Isaac Tull and wife. The law of Kansas, plead by the respondent and introduced in evidence by it, provides for service by publication in divorce proceedings and that, in cases where service may be made by publication, service of the summons may be made out of the State by the sheriff of the county in which such service is made, and that such service *may be proved by the affidavit of the person making the same* before certain officers named in the statute, and when service is thus made *and proved* it shall have the same effect as service obtained by publication and no other or greater force and effect. (See statute set out in the statement of the issues.) The proof in this case is that, on March 2, 1871, F. M. Tull and Lucy A. Tull intermarried in Missouri; that from the time of this marriage until F. M. Tull removed to Spokane Falls they lived in Missouri and Kansas; that F. M. Tull first came to Spokane Falls December 24, 1886, and on the 28th of December, 1886, made a contract to purchase the property in controversy in this action; that prior to coming to Spokane Falls, F. M. Tull had sold out his

business and real estate in Kansas with a view to hunting a location elsewhere. F. M. Tull testifies:

"I sold out my business and started out to hunt a new location. I went to southern California and up to San Francisco and around Seattle and Tacoma and Portland, and landed here and bought—made this purchase and located here, (Spokane Falls)."

Question. "What was your purpose when you purchased property here in Spokane as to making this your place of residence?"

Answer. "I decided to locate here and came back here as soon as I could get here."

The first time F. M. Tull was in Spokane he contracted for
558 brick with which to erect the house that he afterwards erected on the property he had contracted to purchase. He went back to Kansas, after contracting for the property and building, to wind up his affairs there, with the intention of coming back to Spokane as soon as he could get there; that he came back to Spokane and was there two or three times in the early part of the year. He says: "I came here, I think in March (1887) and then "went away again, and then came back and went East again. I "think I was here (Spokane Falls) at least two or three times that "spring before I was ready to go ahead with the building, on ac- "count of brick—waiting for the brick to be burned." He testified on cross-examination that he lived in Kansas about ten years before coming to this State, the last few years in Kingman, and that he was in the furniture business; that he commenced to build on the property in controversy about the first of June, 1887, and opened up the furniture business in that building the first of August, 1887; that after his December trip in 1886, to Spokane, he thinks he was next there in April, 1887; that he stopped at a hotel; that he did not bring his family with him; that he stayed two or three weeks, went away and returned some time in May, the last time to stay, and on the first of July went East to buy his stock. In rebuttal, after respondent had introduced in evidence the record of the divorce in Kansas, F. M. Tull, called for appellants, testified that his wife left Kansas in January, 1887; that she went from Kansas to Missouri to her father's; that his wife went to California some time in the spring of 1887, that she came to Spokane Falls in July, 1887, and that, the last of July or first of August, 1887, in Spokane Falls, he remarried her. In connection with this evidence the plaintiffs offered in evidence from the files of the court a complaint in the suit of Lucy A. Tull *v.* Francis M. Tull, filed on the 28th of July, 1887, a summons issued upon it and a præcipe and stipulation to dismiss. The respondent objected to their introduction for the reason that they were papers in a controversy between parties not parties to this action, and that they
559 were mere declarations not made or taken in form of testimony, and were secondary evidence of any fact that might be material in this controversy. The court sustained the objection but permitted the papers to be marked for identification, and they are brought up with the record. An exception was saved to the ruling of the court in excluding this testimony. An examination

of the complaint offered shows it to be a suit in equity brought by the wife against the husband on the 28th day of July, 1887, in the territorial district court holding terms at Spokane Falls, among other things, to set aside on the grounds of fraud the decree of divorce granted in Kansas alleging want of service on her and no knowledge of such divorce, and charging facts which, if true, would have entitled her to the relief prayed for. We have set out more fully the substance of this complaint in the statement. The summons issued under the practice then in force set forth the cause and general nature of the action and — appears therefrom to have been served on the husband on the 28th day of July, 1887, at Spokane Falls. The stipulation is dated the 30th day of July, 1887, purports to be signed by the husband and wife, and dismisses the action on the payment of costs. We think this evidence should have been received. Taken in connection with the conduct of the husband in remarrying the wife immediately on the filing of this complaint, it was a circumstance tending to show the fraudulent character of the divorce proceedings in Kansas. It is not to be presumed that a husband, after charging his wife with being, in effect, a common prostitute, and stating that he had just discovered that fact and for that reason was granted a divorce on May 9, 1887, would, when confronted by the wife with the charges contained in her complaint, remarry her within two days after the complaint was filed, unless he was anxious to prevent an investigation of the facts charged against him. The wife is dead. This is the best evidence attainable under the circumstances of her attitude in relation to the Kansas divorce. These declarations were made long before the
560 cause for the action arose and when there could have been no anticipation of this action and under certainty of exposure if they were untrue. These, to be sure, are mere declarations, but they are in the nature of *res gestæ* and were in effect made by the wife to the husband and he acted thereon, when she first discovered the fact that a decree of divorce had been obtained by him, which she asserted was fraudulent, and they are contemporaneous with the main fact under consideration, and illustrate its character. Says Greenleaf:

"There are *other declarations* which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and, in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the *res gestæ*, may always be shown to the jury, along with the principal fact; and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring

this class of cases within the limits of a more particular description. The principal points of attention are, whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." * * *

Greenleaf on Evidence, § 108.

Holding this view, and this being a trial *de novo*, we will consider these papers in evidence as a circumstance tending to show, with the other facts in the case, that the Kansas divorce was fraudulently obtained. There is intrinsic evidence of fraud in the divorce record which overcomes the presumption that the wife appeared in that proceeding by attorney or otherwise or that she had any notice of the suit. The summons required her to appear and answer by the 10th day of June, 1887. The decree bears date May 9, 1887. It recites that she had been *personally* served with process. The record fails to show, as required by the law of Kansas, *proof* of any service of process whatever. The law of Kansas required that when summons was served by a non-resident sheriff, as in this case, such service should be proved by the affidavit of the person making the same before the clerk of a court of record, or other officer
561 holding the seal thereof, or before a commission appointed by the governor of Kansas under the act providing for the appointment of commissioners to take depositions, etc. The only evidence of service of summons in this cause is the mere certificate of a person who says he is sheriff of Sacramento county, State of California. The recital in the decree that the defendant had appeared and answered when examined in connection with that appearance and answer tends to show that such appearance and answer were fraudulent. The pleadings of appellants and respondent in this action aver, and the proofs show, the marriage of the wife and the birth of her children. Yet her alleged answer in the divorce case is so general in terms that it denies her marriage to the plaintiff and the paternity of her children. The decree fails to recite any facts as to the residence of the husband or whether the alleged adultery had been condoned, although these facts were alleged in the petition and were necessary allegations. It fails to award the custody of the children, although the husband prayed for their custody. The evidence shows that F. M. Tull was living with his wife and family up until her departure, in January, 1887, to her father's, preparatory to her final journey to her new home on the Pacific slope. The complaint in the divorce case alleges specific acts of adultery in 1884 and acts of adultery generally, but fails to allege when this was discovered by the husband, before or after the departure of his wife from Kansas. On the day the complaint was filed the first summons was issued to the sheriff of Harrison county, Missouri, but no service was made of this writ. The alias summons to the sheriff of Sacramento county, California, was made on the 13th of April, 1887, at the time the testimony of the husband shows that he was in Spokane Falls. The home in Kansas had been broken up in January, 1887, with the intention of making a new home at Spokane, and

active steps to set up such new home had been taken before the time of the filing of the divorce proceedings. Neither the husband nor the wife had his domicile in Kansas at the time
562 that the divorce suit was commenced. It is a universal rule, so familiar that authorities need not be cited in support thereof, that to give courts of any State jurisdiction over the marriage relation between a husband and his wife, one of the parties at least must have a domicile within that State. But the respondent claims that, inasmuch as the record shows the appearance of Lucy A. Tull by an attorney in the divorce suit in Kansas, it cannot now be collaterally questioned by her heirs in this suit, or the jurisdiction of the court disputed. This divorce record is plead and introduced in evidence and effect is sought to be given to it here by virtue of section 1, article IV, Constitution of the United States and the laws of Congress, to give full credit to the records of sister States. The decision of the Supreme Court of the United States upon questions arising under this provision of the Constitution and laws of Congress to give it effect should be controlling upon the supreme court of this State. The Supreme Court of the United States, in Thompson *v.* Whitman, 18 Wall., 457, has decided against the contention of the respondent. In that case the court says:

"The main question in the cause is, whether the record produced by the defendant was conclusive of the jurisdictional facts therein contained. It stated, with due particularity, sufficient facts to give the justices jurisdiction under the law of New Jersey. Could that statement be questioned collaterally in another action brought in another State? If it could be, the ruling of the court was substantially correct. If not, there was error."

The judgment was affirmed. The syllabus is as follows, and is fully borne out by the text:

"Neither the constitutional provision, that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered.

The record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist.

Want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem*, as to the thing.

By a law of New Jersey non-residents were prohibited from raking clams and oysters in the waters of that State under penalty of forfeiture of the vessel employed; and any two justices of
563 the county in which the seizure of the vessel should be made were authorized, on information given, to hear and determine the case: *Held*, that if the seizure was not made in the county where the prosecution took place, the justices of that county had no jurisdiction, and that this fact might be inquired into in an action for making such seizure brought in New York, notwithstanding the

record of a conviction was produced which stated that the seizure was made within such county."

We think from the extrinsic evidence in this case, and that intrinsically appearing in the record offered in evidence, that the Kansas court had no jurisdiction to enter the decree of divorce plead, that such decree is fraudulent and void and no bar to the property rights of the wife, and that the marriage ceremony at Spokane was an empty form.

The husband, F. M. Tull, came to Spokane Falls in December, 1886, and contracted for the purchase of the property in controversy in this action, and under such contract it was, in June and August, 1887, conveyed to him and by him improved. When the husband was married one hundred dollars would cover all his property, and the wife had no property. In some way, the evidence does not disclose how, the wife accumulated $300 in money and a farm in Missouri which was sold for $1000. While the husband, wife and children were living as a family in Kansas, the husband carried on the furniture business and accumulated in real estate and in his business property which he sold in the fall of 1886 and from which he realized, after settling up his business in Kansas, about $25,000. This money, with the wife's money and profits of his business in Spokane, was all invested in paying for the property in controversy and improving the same, deducting therefrom the living expenses of the family. The respondent claims that we are to presume that the common law prevailed in Kansas and, therefore, that the money accumulated there was the separate property of the husband, and that the property here purchased and improved with that money is also the separate property of the husband. The appellants contend that, inasmuch as the territory embraced within the State of Kansas was a part of the Louisiana purchase, Kansas
564 should, like Louisiana, be presumed to have inherited from the Spanish law the system of community property rights between spouses. The territory embraced within the present State of Kansas, when acquired under the Louisiana purchase, was not inhibited by a civilized people and no system of laws of European origin existed there; the laws existing in Kansas when that purchase was made were the tribal customs of savages; hence, we cannot presume that, because Kansas was part of the Louisiana purchase, the community system existed there in 1887. People from all the States of the Union and from all parts of Europe settled in Kansas and formed the civilized system of laws under which they live. We know from the history of our own State that a people may live at one time under one system and at another time under a different system. Why, then, should we presume that any particular system of laws regulating the property rights of married persons existed in Kansas in 1886–7? The only proof offered as to the laws of Kansas is not as to the status of property during the continuance or existence of the community, but as to the effect of a dissolution by death or divorce. In the absence of proof of the laws of another State in relation to the property rights of husband and wife as to property acquired there during marriage, it has been held

that they will be presumed to be the same as those of the State where the proceeds of such property have been reinvested.

Marsters *v.* Lash, 61 Cal., 622;
Shumway *v.* Leakey, 67 Cal., 458;
Mortimer *v.* Marder, 93 Cal., 172.

This court has held that under the statutes of this State lands, acquired after marriage by a deed of purchase expressing a money consideration, are presumed to be community property, and the presumption can be rebutted only by clear and convincing proof that the consideration was furnished out of the grantee's separate property.

Yesler *v.* Hochstettler, 4 Wash., 349.

From the view we take of this case it is not necessary to
565 further discuss the question of presumptions. But it seems, even from the laws introduced in evidence by respondent, that dower and curtesy are abolished in Kansas and one-half of the real estate, after paying debts on the death of one spouse, passes to the other, thus showing that the common law is no longer in force there, in this respect at least; and, if anything is to be presumed, these facts might warrant the presumption that Kansas had a system somewhat similar to our own.

The decisive question in this case is, whether the respondent took its mortgages upon the property in controversy in good faith, without knowing or having the means of information by which it might, by the exercise of common prudence, have known, of the acts of the guardian and F. M. Tull in transferring the property from the minor children to F. M. Tull, and whether those acts were fraudulent. The respondent is a corporation engaged in loaning money; its principal place of business and home office being in San Francisco, California. It must transact its business through the hands of agents. At the very outset it becomes necessary to inquire touching the agents of the respondent who managed for it the various loans, and mortgages to secure the same, mentioned in the pleadings and evidence in this action. Mr. Tourney, who was connected with the respondent company for many years and was its secretary, testifies that he supervised the business of the bank to a great extent in making loans, subject to the approval of the board of directors; that the board of directors passed upon the loans and applications; that the Tull applications for loans were received from Mr. B. Goldsmith, of Portland, Oregon; that Mr. Goldsmith was the statutory agent of the respondent corporation for Oregon and clothed with authority to accept, in that State, service of judicial process; that the respondent dealt with Mr. Goldsmith as a broker, as it would deal with other brokers; that Mr. Goldsmith had no other appoint-
ment from the respondent; that the board of directors of the
566 respondent, in passing upon loans, placed reliance to some extent on the "reports" of Mr. Goldsmith; that it had confidence in Mr. Goldsmith's judgment; that the president of the company, Mr. Gottig, had been in Spokane before any of the loans

were made and that he and Mr. Gottig had been here after the first loan was made; that on such trips, "in visiting a city like Spokane, "we would limit ourselves to a certain district, and establish in our "minds certain values per front foot for certain blocks, and so we "had a certain value for Riverside avenue between one block, and "certain values for another, and these would be a sort of a guide, a "check to us, when an application would be received with recom-"mendations of values." He further stated that, on the 16th day of May, 1892, Messrs. Kinnaird & Happy were designated as the attorneys at Spokane, whose certificate of title the respondent would accept; that on all the loans prior to the $20,000 loan, Cox, Smith & Teal, or Milton W. Smith successor of Cox, Smith & Teal, gave the certificates of title as to the property mortgaged, and that Milton W. Smith gave the certificate of title on which the respondent acted for the $100,000 mortgage, and Kinnaird (J. M.) and Happy gave the certificate of title for the $20,000 on which it acted; that the respondent had no knowledge of J. M. Kinnaird's connection with the prior mortgages or the probate proceedings, and the first intimation of that was when the interrogatories were propounded to the respondent in this action; that respondent never employed any one for any purpose in connection with the mortgages prior to May, 1892, then the firm of Kinnaird & Happy was designated to certify titles; that the respondent's officers did not have any actual knowledge that the property had gone through probate court and depended on a probate sale. He said the first loan was delayed after application, but that he did not know why and he did not remember whether he knew of the death of Mrs. Tull, or whether the respondent took any action on that account; that the only knowledge of title the respondent had was that it acted on the certificate of title given by Cox, Smith & Teal or Mr. Smith, for all loans prior to the $20,0000 and as to
567 the $20,000 the certificate of title by Kinnaird & Happy was its only knowledge; but the four mortgages were drawn in the office of Cox, Smith & Teal, or Milton W. Smith, and the $20,000 mortgage by Kinnaird & Happy, all on blanks furnished by the respondent; that the money on these loans was paid over principally on drafts on the respondent from B. Goldsmith, drawn principally to the order of F. M. Tull and paid principally through the First National Bank of Spokane. The condition of all the loans was that all the expenses were to be paid by the borrower; that no reports as to value and condition of the property and improvements thereon, other than Mr. Goldsmith's, were ever required by the respondent. The witness also testified that the respondent had never heard of Horace L. Cutter, cashier of the First National Bank of Spokane, in connection with these loans, until the interrogatories were filed in this action; that the respondent had had some communication with Mr. Cutter, applying for other loans. Milton W. Smith, of Cox, Smith & Teal, testified that in 1886 or 1887, the members of his firm were appointed by the respondent agents or attorneys to examine titles for the respondent, and to certify as to the same, but they were never paid by the respondent any retainer or anything

for their services; that such employment was special and they were designated as the attorneys to certify titles for respondent in Oregon particularly, and sometimes in Washington; that he succeeded his firm, on its dissolution, as examiner for respondent, in the same manner as his firm was employed; that no personal examination of the records in Spokane county, in reference to titles on the Tull loans, was made, but reliance was placed wholly upon the abstract of title furnished; that B. Goldsmith employed him or his firm directly to examine the titles to all the Tull loans except the $20,000 loan; that Mr. Cox of the firm examined the title as to the first loan on the abstract furnished by B. Goldsmith. The first abstract purported to be made by D. M. Thompson, per
568 B. N. Carrier, as examiner, at the request of J. M. Kinnaird. It remained in the possession of Mr. Smith until the next loan was to be passed upon. It was then handed to Mr. B. Goldsmith to be continued down to the date of the loan applied for. This was the method as to all the loans. The certificate of title after examination was given to Mr. B. Goldsmith to be forwarded to the respondent. Each time a loan was made a new certificate of the abstractor was put upon the abstract. The first abstract was carried down in this way. These abstracts were never turned over or sent to the respondent at San Francisco, and the officers of the society never saw any abstract upon which Mr. Smith or his firm certified the title. The abstracts were all delivered to his firm or himself by Mr. B. Goldsmith. Neither Mr. Smith nor his firm had any correspondence or connection with the respondent in connection with these loans, further than examining the title at the instance of Mr. Goldsmith on an abstract furnished by him, giving the certificate of title to Mr. Goldsmith, which it was understood was for respondent, and receiving pay therefor from Mr. Goldsmith. Bernard Goldsmith testified that he had resided in Portland, Oregon, for thirty-eight years; that since 1880, he had been in the brokerage business; that the Tull loan was first brought to his attention by H. L. Cutter, cashier of the First National Bank of Spokane; that in May, 1888, witness was at Spokane and Cutter told him a customer of his bank wanted a loan of $40,000, for which he was willing to pay eight per cent. interest, with commission of $1200, and furnish an abstract; that if witness could place the loan, they would divide the commission. Witness told Cutter that he would look at the property and see if it was such a loan as he could recommend; that he did look at the property and went back and told Cutter that he could recommend the loan. By an arrangement made by Mr. Cutter, he met F. M. Tull at the First National Bank building, talked over the loan, and the terms were agreed upon. Witness drew up application for the loan and Tull signed it. An agreement was drawn
569 up by Goldsmith and signed by Tull, dated May 8, 1888, by which Tull appointed Goldsmith as his agent to procure the loan, and agreed to pay Goldsmith $1,200 for his services in procuring the loan, examining the property, *and the title thereto*, and for making out the necessary papers, documents and mortgage.

This agreement described part of the property in controversy in this action upon which the loan was to be made, and also provided that the mortgage should be a *first* mortgage, the rate of interest should be eight per cent., and that the mortgage was to run three years, and that Tull should pay all taxes assessed against the property and against the mortgage. The witness further said that he mailed Tull's application with witness's report upon it, to respondent at San Francisco. Witness says it was suggested by Cutter or Tull, he did not know which, that it would be satisfactory if Kinnaird would attend to getting out the abstracts. Witness was not much acquainted with Kinnaird but was satisfied and told "him" that when the respondent gave the witness notice. Witness instructed Mr. Cutter to go to work and get up the abstracts or have them gotten up and sent to Cox, Smith & Teal, at Portland, Oregon. The mortgage was prepared by Cox, Smith & Teal, and handed to the witness who forwarded it to Cutter to be executed and placed on record. Between the time the mortgage left Spokane and the time it reached Portland, Mrs. Tull died. The witness says he did not know it, but happened to come to Spokane Falls a few days afterwards and Cutter informed him that Mrs. Tull had died, and wanted to know if some court proceedings would be required before a clear title could be established, and whether, if there was a delay, the loan could be finally consummated. Witness told Cutter that whenever they could present a title which the firm of Cox, Smith & Teal would certify to, he thought the loan could be consummated. The mortgage was prepared by Cox, Smith & Teal and witness Goldsmith, after the mortgage was recorded, sent to Mr. Cutter a draft which the
570 witness had drawn on respondent in favor of Tull, the money being paid in that way as the building progressed. The witness paid for examining the title, certificate of title and drawing the mortgage out of his commissions. The applications for the other loans were made through Goldsmith, reports made by Goldsmith, abstracts examined, certificates of title given and paid for, as in the first loan, and as Mr. Smith testifies; that commissions were paid witness on all loans on the basis of the first loan, except that $500 was all the commission for the second loan. On cross-examination the witness said that nobody appointed him surveyor; that the blanks were gotten up by himself; that he made the survey at no one's request, but in presenting a loan to the respondent it was necessary to make some remarks about it. There was no understanding between him and the respondent that his recommendations should be considered good. He and Cutter were partners in the $1200 commissions, and also in the commissions for the other loans. The mortgages after their execution were delivered to Cutter to put on record, and after being recorded, they were delivered to Mr. Goldsmith. Witness says he never employed or paid Mr. Kinnaird for any services rendered by him. F. M. Tull made written application signed by himself for each loan. Mr. Goldsmith sent in with each of these applications what purported to be a "surveyor's report," signed by himself. In a letter to the respondent's president, dated Portland, Oregon, May 14, 1888, Mr. Goldsmith says:

"During my recent visit at Spokane Falls the enclosed loan was offered. * * * I can strongly recommend the acceptance of the loan as being perfectly safe and good. The owner expects to pay off the loan if made to him from the profits of his business as he is now making money at the rate of $15,000 per year."

His surveyor's report was as follows:

"The within is an application for a building loan

I value the property without improvements at.....	$50,000.
Improvements when completed not less than.....	60,000.
Total	$110,000.

My valuation and the owner's valuation of the lots is low. The owner has in fact been offered more for it. The property is well located and the building is now nearly all engaged and will be occupied as soon as finished. The owner is now expending
571 and will expend on the building $20,000 before he will require any money from us. The owner is a prosperous furniture and carpet dealer, and is worth outside of his real estate over and above all liabilities (he has hardly any) some forty thousand dollars, and expects to pay off this loan if we make it, from the profits in his legitimate business. I can strongly recommend the accepance of this loan as being perfectly safe and good. The town of Spokane is growing and improving wonderfully & it is a substantial city with great prospects as to its future. Arrangements can be made with First National Bank of Spokane Falls to pay the money in the same manner as Goetz & Baers' money is paid to them.

Portland, May 14th, 1888.

(Signed) B. GOLDSMITH."

When the $50,000 loan is wanted it is accompanied by a like "surveyor's report," in which he values land at $100,000 and proposed improvements at $75,000. He says in this report:

"* * * *We* have now a loan of forty thousand doll. on this property which will be paid off by the insurance. * * * When the insurance of $40,000 is paid to *us* and the interest due, we better cancel the old mortgage and have new one made out for this loan if accepted."

When the $10,000 loan is applied for, Mr. Goldsmith makes a "surveyor's report," puts a value on the property and improvements, and writes:

"The applicant will want ten thousand dollars when loan is completed & the balance of the loan as the building progresses. He first made application for a loan of twenty thousand dollars on the 60 x 80 feet lot on Sprague street, ten thousand of which to be put into the building on the lot but as the amount of the loan exceeded the 40% limit and the valuation I suggested to the applicant to give *us* a mortgage for the twenty thousand dollars, covering the property on which *we* have a mortgage for one hundred

thousand dollars now & *and* on the above-mentioned 60 x 80 on Sprague street this he is willing to do and I recommend the acceptance of the loan on the above conditions.
Portland, Or. April 14th, 1893."

On June 8, 1890, the respondent writes to Turner & Graves, attorneys at Spokane Falls and appoints them attorneys for examination of titles at Spokane Falls, and in that letter says: "Blank notes and "mortgages of this society have been sent to Mr. Cutter and prob- "ably have already been handed to you." F. M. Tull says he first talked with Horace Cutter, cashier of First National Bank of Spokane, about the first loan early in the spring of 1888; that when Mr. Goldsmith was up looking over the property he signed the application on a blank furnished by Mr. Cutter or Mr. Goldsmith. After his wife died he was notified by Mr. Kinnaird or Mr. Cutter
572 that he could not get the loan because he could not give title; that Mr. Cutter seemed to have charge. He was told that he would have to go through probate proceedings before the respondent would make the loan. This notification he presumes came from Mr. Cutter; that he did most of the dealing with Mr. Cutter after Mr. Goldsmith had been at Spokane. Cutter told him what to do and directed this end of the corresponding and negotiations for the money. After this talk with Cutter the probate proceedings occurred and witness employed as attorneys to carry them through, the firm of Houghton, Graves & Jones. This question was asked the witness:

"Q. Were you informed or directed by any person acting or assuming to act on behalf of this corporation as to who must be satisfied with this title, to whom it must be referred to on their behalf?

A. Well, I was informed that they would not make the loan on the title that I could give at that time, and when I went into the probate proceedings I tried at all times to carry out their instructions of their agents here so as to make the title as they wanted it, because I wanted the money very bad. I had to have it. My building was partly under construction and I was in great danger of losing it all if I could not get more money to complete it, and I was very anxious to make the loan."

"Q. Now, whose instructions did you act under in perfecting that title?

A. Mr. Kinnaird, he seemed to be the acting attorney here."

The court, on motion of respondent, struck out of this answer, "he seemed to be the acting attorney here;" to which plaintiff excepted. The following is part of this witness's examination:

"Q. Now, what, if anything, did Mr. Cutter say to you at any time pending this proceeding, in reference to the proceeding, and to whom did he direct you in reference to it.

A. He direct- me to Mr. Kinnaird for any legal questions in the proceedings.

Q. What, if anything, did you do then in reference to consulting Mr. Kinnaird about it?

A. I consulted Mr. Kinnaird a good deal all through that proceeding until I got the loan, handed the abstracts, papers and such things to him. He seemed to be, so far as I know, acting as agent of the company. I did not know any one else at the time.

Q. As a matter of fact, state whether or not Mr. Kinnaird was informed from time to time by you or by others in your presence, of the progress of that proceeding.

A. I talked with Mr. Kinnaird several times, very often, about this probate proceeding."

The $40,000 mortgage was delivered to Mr. Tull to execute by Mr. Cutter or Mr. Kinnaird, and when he executed it he delivered it to Mr. Cutter or Mr. Kinnaird. The testimony of Mr. Frank Graves, given in full in the opening statement, strongly tends
573 to prove that Mr. Kinnaird and Mr. Cutter were both representatives of the respondent. J. M. Kinnaird either took the acknowledgment or witnessed all of the several mortgages given to the respondent.

From this evidence we conclude that B. Goldsmith was more than a mere broker for the borrower; he was the agent of the respondent in looking after the various loans made by it to Tull, and in doing all things usually done in connection with such matters, such as looking into the title of the property given as security, employing attorneys to investigate titles, investigating the value, and in paying over the money borrowed when satisfied with the security given; and there is no doubt in our minds that Mr. Cutter and Mr. Kinnaird in all that they did were acting with the full knowledge and consent of Mr. Goldsmith and under his directions generally. It is contrary to ordinary experience in business affairs to presume that the respondent would loan the amount of money involved without having an agent to look after these matters. We must indulge in this presumption, however, if Mr. Goldsmith was not the agent of the respondent for the purposes indicated.

The facts in this case are somewhat similar to the facts in the case of Matteson *v.* Blackmer, 9 N. W., 445. In that case, as here, the claim was put forward that the agent was agent for the borrower only. Judge Cooley in that case says:

"In this transaction he claims to have been agent for Mr. Blackmer in obtaining a loan for him; but giving full effect to all his statements of fact, it is perfectly evident he was agent for his father in this matter as much as at other times. It may be that he was not under pay at the time, but if so he performed a voluntary service of which his father accepted the benefit. Milo took upon himself the whole negotiation, decided upon the security, satisfied himself respecting the title, attended to the execution of the papers, received the money from his father and paid it over to Blackmer; in short did everything there was for an agent to do in the matter and as much as any agent could ever have done in a similar negotiation. Complainant never appeared in the transaction at all, except as he

handed over the money to Milo; and it is idle for Milo to testify that under such circumstances he was agent for Blackmer. It is true he succeeded in extorting from Blackmer a large bonus; but that has been altogether too common a procedure for the agents of money-lenders to have significance on this question."

So in this case, Goldsmith reported upon the value of the securities, fixed the terms of the loan subject to respondent's ap-
574 proval, looked after the title, employed attorneys to examine the same, looked after the execution and recording of the mortgages, received the money and paid it over to the borrower; in fact, did everything there was for an agent to do; and the respondent accepted the benefit of his services, and, as the respondent loaned only to borrowers who paid all the expenses, the mere fact that Goldsmith exacted his pay by way of commissions from the borrower can have no significance. Was Goldsmith agent for the respondent? The fact that a reputable attorney like Mr. Kinnaird, who was afterwards judge of the superior court and the attorney for the respondent when the $20,000 loan was negotiated, acted throughout the probate proceedings for respondent, after Goldsmith's attention had been called to the fact, by Mr. Cutter, that, on Mrs. Tull's death, probate proceedings were necessary, and Goldsmith said to Cutter that if Cox, Smith & Teal would pass the title that would be sufficient to obtain the loan; the fact that the abstract of title was gotten up at the request of Mr. Kinnaird; the fact that when the loan was first proposed Mr. Kinnaird was employed by Goldsmith and Cutter to look after getting out the abstract; the fact that Mr. Kinnaird was corresponding with Cox, Smith & Teal as to the title during the probate proceedings, and the fact that the mortgages were acknowledged before Mr. Kinnaird as a notary public, and were witnessed by him and some of them recorded at his instance, all strongly confirm our conclusion that Mr. Kinnaird was employed by Mr. Goldsmith to look after perfecting the title, so that Cox, Smith & Teal, who resided at Portland, Oregon, would give a certificate of title when the abstract was referred to them for examination. Mr. Kinnaird had full knowledge of the probate proceedings. The respondent is bound and affected by the knowledge and notice its agent had.

The Distilled Spirits, 11 Wall., 356.

It cannot be said then to be a purchaser in good faith. But
575 conceding that it did not have actual knowledge that the probate proceedings were for the purposes shown in this case, it had actual knowledge of circumstances to put it on inquiry as to F. M. Tull's title to the children's half of the property, and, by the exercise of reasonable diligence, could have obtained knowledge of all the circumstances under which the order of sale of the probate court was made and the title transferred. The records in the auditor's office of Spokane county would have shown the guardian's deed to Tull and that referred to the probate proceedings. The abstract of title upon which Cox, Smith & Teal based their certificate of title must have contained a record of the probate proceedings;

at least it contained or should have contained the guardian's deed. That deed showed that the title originally belonged to the children and had been sold by an order of the probate court. An investigation of the probate records in that proceeding would have disclosed these facts: that the natural guardian, the father, with whom the children were living, had joined in the petition requesting that their uncle be appointed their guardian; that the father was surety on the general bond of the guardian; that the father was surety on the bond required under the law when the first tract was sold, was surety on the bond of the guardian for the sale of the second tract, and was the purchaser of both tracts. These facts were sufficient to put a prudent man on inquiry. The least investigation would have disclosed the matter as it has been disclosed to us by the testimony.

"Whatever is notice enough to excite the attention of a man of ordinary prudence and call for further inquiry is in equity notice of all facts to the knowledge of which an inquiry suggested by such notice and prosecuted with due and reasonable diligence would have led."

Kerr on Fraud and Mistake, 236.

"It will not do for a purchaser to close his eyes to facts; facts which were open to his investigation, by the exercise of that diligence which the law imposes. Such purchasers are not protected. * * * No principle is better established, than that a purchaser must look to every part of the title which is essential to its validity. * * * When a purchaser cannot make out his title
576 but through a deed which leads to a fact, he will be affected with notice of that fact."

Brush v. Ware, 15 Pet., 93.

The proof is uncontradicted, and it is admitted by the respondent in its brief, that the probate proceedings were for the purpose of vesting title to the entire piece of property in the father so that he might mortgage it to the respondent in order to get money to go on with the buildings in course of construction on part of the property, and that, in place of the children's interest being sold for cash, they were to get a mortgage, second and subordinate to the respondent's, for a sum the father was to go through the form of bidding, which had been agreed upon in advance by the probate court, on testimony taken as to the fair value of the children's interest. The testimony of P. D. Tull, the appointed guardian, shows that he was used as an instrument by the father to accomplish this end. He was in no sense of the word "guardian." He did just as he was directed to do by the father, and it seems with full knowledge of the probate court. The father was the actual guardian. The law as it existed at the time these alleged sales by the guardian were made authorized the probate court, when the estate was suffering waste or a better investment of the value could be made, to sell the infant's interest in real estate. Here no *bona fide* sale in the open market to the highest bidder was contemplated. If we should

uphold these transactions, the interest of infants in real property in this State would be under a very precarious tenure. It may be conceded that there was no intention—and we think that is a fact—on the part of the attorneys, the probate judge, Tull and the respondent, to injure the appellants, and that they acted from the best of motives, but the fact stands out, nevertheless, that they perpetrated in law a fraud upon the children. As was said by Black, C. J., in Nicholson's appeal, 20 Pa. St., 50:

577 "It matters little to an orphan child whether his interests are sacrificed and his prospects blighted by well-meaning ignorance or by wilful malice. Either is within the definition of misconduct, a word which applies not to the motive but to the act."

In Weinstock *v.* Levison, 14 N. Y. Supp., 64, it was held that proceedings for the sale of an infant's interest in land, not instituted in good faith to sell such interest to a real purchaser, but to transfer the entire title unincumbered by the infant's interest, to his father, are absolutely void, though full value was paid for the infant's interest, and no wrong in fact was intended. The court in that opinion says:

"It makes no difference, in my opinion, that no fraud was intended; nor is it material, as was shown, that the infant received fair value of her interest in the property from the father. The facts still remain that the proceeding was not resorted to for the purpose of selling in good faith to a real purchaser the infant's property, but the alleged purchaser was brought forward to assist and co-operate with the special guardian in carrying out the plans arranged beforehand by which the title, unincumbered by the infant's interest, could be transferred to the father. It is true, the father deposited with the city chamberlain the money value of the infant's interest, and while, therefore, no attempt to overreach or wrong the infant was done or intended, it would never do to hold that such a proceeding was merely irregular or voidable, but it should be held to be absolutely void."

See also

Moscowitz *v.* Homberger, 43 N. Y. Supp., 1130;
Rome Land Co. *v.* Eastman, 6 S. E., 586.

In Rome Land Company *v.* Eastman, *supra*, it was held that a sale under such circumstances was contrary to public policy.

"As a general rule, a party occupying a relation of trust or confidence to another is, in equity, bound to abstain from doing everything which can place him in a position inconsistent with the duty or trust such relation imposes on him, or which has a tendency to interfere with the discharge of such duty. Upon this principle, no one placed in a situation of trust or confidence in reference to the subject of a sale can be the purchaser, on his own account, of the property sold. If such a one purchases the property, it is in the option of the person interested in the property, and to whom the relation of trust or confidence was sustained, to set aside the sale, within a reasonable time, however innocent the purchaser may be. 1 Story, Eq. Jur. §§ 307–323, and cases cited."

In Hindman *v.* O'Conner, (Ark.) 13 L. R. A., 490, the facts were as follows: At a judicial sale of minors' property their step-grandmother bought in the property. At the death of the children's mother, and at her request, the step-grandmother took charge
578 of them and they thereafter made their home with her. The management of the sale of the minors' property was by law imposed upon a stranger, the curator of the estate (which in Arkansas is the same as our guardian), and the purchaser acted fairly and in good faith. Yet the court, when the children became of age, at their request, set the sale aside. In rendering its opinion, the court said:

"The doctrine as to purchases by trustees, guardians, administrators, and persons having a confidential character arises from the relation between the parties, and not from the circumstances that they have power to control the sale. The right to set aside the sale does not depend on its fairness or unfairness. To set aside the purchase, it is not necessary to show that it was actually fraudulent or advantageous. If the trustee or other person having a confidential character, can buy in an honest case, he may in a case having that appearance, but which may be grossly otherwise; and yet the power of the court, because of the infirmity of human testimony, would not be equal to detect the deception. It is to guard against this uncertainty, and the hazard of abuse, and to remove the trustee and other persons having confidential relations from temptation, that the rule does and will permit the *cestui que trust* or other person to come at his option, and, without showing actual injury or fraud, have the sale set aside. Davoue *v.* Fanning, 2 Johns. Ch. 252, 1 L. Ed. 365; Torrey *v.* Bank of Orleans, 9 Paige, 663, 4 L. Ed., 859; *Ex parte* James, 8 Ves. Jr., 345; Brochett *v.* Richardson, 61 Mass., 766; Van Epps *v.* Van Epps, 9 Paige, 237; 4 L. Ed., 682; Campbell *v.* Walker, 5 Ves. Jr. 678, 13 Ves. Jr. 601; Callis *v.* Ridout, 7 Gill & J. 1; *Ex parte* Lacey, 6 Ves. Jr. 625; *Ex parte* Bennett, 10 Ves. Jr. 381; Campbell *v.* Pennsylvania L. Ins. Co. 2 Whart. 62; Michoud *v.* Girod, 45 U. S. 4 How. 557, 11 L. Ed. 1100, and cases before cited; McGaughey *v.* Brown, 46 Ark. 25."

We think that the case at bar presents stronger reasons for setting aside the sales than does Hindman *v.* O'Conner, *supra.* The court in that case stated the rule of law correctly, and it is unnecessary for us to enlarge upon the same. We have already decided that the property in controversy is presumed to have been the community property of F. M. Tull and wife at the time of her death. If this presumption did not control, we think that the respondent is estopped from disputing the title of these children. When Lucy A. Tull died respondent refused to go on with the loan until the interest of the children was transferred to the father. F. M. Tull and the respondent dealt with this property as a whole on the basis that the children had one-half interest therein. F. M. Tull and
579 Lucy A. Tull had agreed as to the status of the property before her death, and this status was recognized by the respondent; but the presumption that it was community property not having

been overthrown, it is not necessary to further comment on the effect and character of this estoppel.

The judgment and decree of the lower court is reversed with costs to appellants. This cause is remanded to the court below with instructions to enter a judgment and decree herein adjudging and decreeing that Dora May Dormitzer, William L. Tull and Ernest B. Tull, the appellants herein, are entitled to an unincumbered, undivided one-half of the real estate described in the pleadings in this action, and that the guardian deeds described in said pleadings and orders of the probate court of Spokane county, directing the sale of said half interest, or in any way affecting the same, and the said guardian deeds conveying the same to F. M. Tull by P. D. Tull as guardian of said appellants, as set out in the pleadings, be declared fraudulent, null and void; and also decreeing that the plaintiffs in the action below recover their costs.

WHITE, *J.*

We concur:
DUNBAR, *C. J.*
REAVIS, *C. J.*

I dissent:
ANDERS, *J.*

I dissent:
FULLERTON, *J.*

580 In the Supreme Court of the State of Washington.

MONDAY, *January* 7, 1901.

DORA MAY DORMITZER and WILLIAM L. TULL, Plaintiffs,
vs.
THE GERMAN SAVINGS & LOAN SOCIETY and Ernest B. Tull, Defendants.
} No. 3528. Judgment.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of Spokane county and upon the argument of counsel and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now on this 7th day of January, A. D. 1901, on motion of counsel for appellants considered adjudged and decreed that the judgment of the said superior court be and the same is hereby reversed with costs, the petition for rehearing denied, and that the said Dora May Dormitzer, William L. Tull and Ernest B. Tull have and recover of and from the said The German Savings & Loan Society the costs of this action taxed and allowed at $414.95 dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to said superior court for further proceedings in accordance with the opinion herein filed.

581 In the Supreme Court of the State of Washington.

DORA MAY DORMITZER and WILLIAM L. TULL, Plaintiffs and Appellants,
v.
GERMAN SAVINGS AND LOAN SOCIETY, Respondent; Ernest B. Tull, Defendant and Appellant.

No. 3528. Clerk's Certificate.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above-entitled cause as the same now remains on file in my office.

Seal of the Supreme Court, State of Washington.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Olympia this 6th day of February, 1902.

C. S. REINHART, *Clerk.*

582 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Dora May Dormitzer, William L. Tull, and Ernest B. Tull, appellants, and The German Savings & Loan Society, respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of
583 a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said respondent, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceed-

ings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 2d day of July, in the year of our Lord one thousand nine hundred and two

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

584 [Endorsed:] State of Washington, county of Spokane, ss: Due service of a true copy of the within writ of error is hereby acknowledged this 11th day of July, A. D., 1902, in Spokane county, State of Washington. Nash & Nash attorneys for Dora May Dormitzer and William L. Tull. Wm. M. Murray attorney for Ernest B. Tull. W. A. Lewis, attorney for William L. Tull. 3528. Filed Jul- 14 1902 C. S. Reinhart clerk.

585 UNITED STATES OF AMERICA, ss:

To Dora May Dormitzer, William L. Tull, and Ernest B. Tull, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Washington, wherein The German Savings & Loan Society is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph McKenna, associate justice of the Supreme Court of the United States, this 2nd day of July, in the year of our Lord one thousand nine hundred and two.

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

586 [Endorsed:] 3528. State of Washington, county of Spokane, ss: Due service of a true copy of the within citation, is hereby acknowledged this 11th day of July, A. D. 1902, in the county of Spokane, State of Washington. Nash & Nash attorneys for Dora May Dormitzer and William L. Tull Wm. M. Murray attorney for Ernest B. Tull and guardian *ad litem* for heirs. W. A. Lewis attorney for William L. Tull. Filed Jul- 14 1902. C. S. Reinhart clerk.

On this eleventh day of July, in the year of our Lord one thousand nine hundred and two, personally appeared W. W. Hindman before me, the subscriber, a notary public for the State of Washington residing at Spokane and makes oath that he delivered a true copy of the within citation to Nash & Nash and W. A. Lewis att'ys for Dora May Dormitzer and William L. Tull and to Wm. M. Murry as guardian *ad litem* and att'y for Ernest B. Tull on July 11" 1902 in county of Spokane and State of Washington.

W. W. HINDMAN.

Sworn to and subscribed the 11th day of July, A. D. 1902.

[Seal E. L. Sanders, Notary Public, State of Washington.]

E. L. SANDERS,
Notary Public.

Commission expires Sept. 5, 1905.

587 In the Supreme Court of the State of Washington.

THE GERMAN SAVINGS AND LOAN SOCIETY, a Corporation, Plaintiff in Error,
vs.
DORA MAY DORMITZER, WILLIAM L. TULL and ERNEST B. TULL, *et al.*, Defendants in Error.

Now, on this 19th day of July, 1901, comes The German Savings and Loan Society, by its attorneys, and says that in the records and proceedings in the above-entitled action, there is manifest error in this, to wit:

1. The supreme court of the State of Washington erred in that full faith and credit should have been given by the courts of the State of Washington to a certain judgment or decree of divorce rendered in and by the district court of Kingman county, State of Kansas, a court of record and general jurisdiction, on the 20th day of May, 1887, upon the complaint of the plaintiff, personal service upon and answer by defendant, in a certain case wherein F. M. Tull was plaintiff, and Lucy A. Tull was defendant, which judgment was specially set up and pleaded as a bar to the maintenance of this action, and in fact in the judgment and decree of the supreme court of the State of Washington, in this action, full faith and credit as required by section 1, article IV, of the Constitution of the United States, and the laws of Congress, was not given to said decree of divorce; which Federal question was necessary to be, and was, passed upon by the supreme court of the State of Washington, in the final determination of said cause, the decision rendered by the supreme court of the State of Washington being against said claim so specially set up and claimed by the petitioner, The German Savings and Loan Society.

2. The supreme court of the State of Washington erred in holding that the defendant, Lucy A. Tull, in said divorce proceeding was not served with process in said cause.

588 3. In holding that the answer filed by and in behalf of the defendant, Lucy A. Tull, and the defense in said action by her attorney of record, one J. W. Hughes, was fraudulent and unauthorized.

4. The said supreme court erred in holding that at the time of the commencement of said action for divorce and of the rendition of the decree therein, the plaintiff, F. M. Tull, was not a resident of the State of Kansas, within the meaning of the laws of said last-named State.

5. The said supreme court erred in holding that said decree of divorce was obtained by the fraud of the plaintiff, F. M. Tull.

6. The said supreme court erred in holding that the decree of divorce rendered by a court of competent jurisdiction in a sister State, upon personal service and answer and defense, interposed by her, through an attorney of record, can be collaterally assailed on the grounds of fraud, in the courts of the State of Washington, by the heirs of the defendant.

7. The said supreme court erred in holding that a complaint filed by the defendant, Lucy A. Tull, in the district court of Washington Territory, in an action begun by her against F. M. Tull, in July following the rendition of said decree of divorce, was admissible in evidence in a collateral proceeding by her heirs, as part of the *res gestæ*, to establish the alleged fraud in the procuring of said decree of divorce.

8. The said supreme court erred in holding in this action that the district court of the State of Kansas, in said divorce proceeding, had no jurisdiction of the parties or subject-matter therein.

9. The said supreme court erred in holding that the plaintiff in the said divorce proceeding could lose, and had lost his long-time residence in the State of Kansas, without acquiring a residence elsewhere, and that the district court of the State of Kansas, in that proceeding was, therefore, without jurisdiction of the prrties to such an extent as to be open to attack by the heirs of one of the parties in this action.

589 10. The said supreme court erred in that the decision rendered lacks the concurrence of a majority of the said court, as constituted at the time of the hearing of said cause and its submission to said supreme court for its determination; wherefore, the said decision was null and void and in violation of article V of the amendments to the Constitution of the United States, which provides that no person shall be deprived of life, liberty or property, without due process of law.

11. The said supreme court erred in that its said decision and decree is entirely aside and outside of the issues raised by the pleadings and record in this cause, and is, therefore, null and void in that it in effect takes the property of the German Savings and Loan Society without due process of law, in violation of article V of the amendments to the Constitution of the United States; all of which errors appear in the record and proceedings in this cause.

Wherefore, the German Savings and Loan Society prays that the order and judgment of the supreme court of the State of Washington

be reversed and such other proceedings be had therein as may be equitable and just.

M. J. GORDON,
STRUVE, ALLEN, HUGHES & McMICKEN,
HAPPY & HINDMAN,
Attorneys for the German Savings and Loan Society.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Due service of a true copy of the foregoing assignment of errors is hereby acknowledged this 11th day of July, 1902, in the county of Spokane, State of Washington.

NASH & NASH,
Attorneys for Dora May Dormitzer and William L. Tull.
WM. M. MURRAY,
Per G. M. N.,
Attorney for Ernest B. Tull.

Endorsed: Filed July 14, 1902. C. S. Reinhart, clerk.

590 In the Supreme Court of the United States.

THE GERMAN SAVINGS AND LOAN SOCIETY,
Plaintiff in Error,
vs
DORA MAY DORMITZER, WILLIAM L. TULL,
and Ernest B. Tull, Defendants in Error.
} Bond on Writ of Error.

Know all men by these presents: That we, The German Savings and Loan Society, a corporation, as principal, and Pacific Surety Company, a corporation, as surety, are held firmly bound unto the above-named defendants in error in the sum of two thousand (2,000) dollars, lawful money of the United States, to be paid to the said defendants in error, their executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 27th day of June, A. D. 1902.

The condition of the above and foregoing obligation is such, that whereas the above-named plaintiff in error has sued out a writ of error to the supreme court of the State of Washington to reverse the judgment of said supreme court in a cause in which the above-named Dora May Dormitzer and William L. Tull were plaintiffs and The German Savings and Loan Society and Ernest B. Tull were defendants;

Now, therefore, if the above-named, The German Savings and Loan Society shall prosecute said writ to effect and answer all costs

and damages if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

THE GERMAN SAVINGS AND LOAN SOCIETY,
[SEAL.] By B. A. BECKER, *Its President, and*
By GEO. FOURNEY, *Its Secretary.*
PACIFIC SURETY COMPANY,
[SEAL.] By WALLACE EVERSON, *President.*
LYFORD SINCLAIR, *Ass't Sec'ty.*

591 Approved:

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

Washington, D. C. July 2nd, 1902.

592 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Personally appeared before me, Lyford Sinclair, on this twenty-seventh day of June, one thousand nine hundred and two, known to me to be the assistant secretary of the Pacific Surety Company, the corporation described in and which executed the annexed bond of German Savings and Loan Society as surety thereon, and who, being by me duly sworn, deposes and says, that he resides at San Francisco, in the State of California; that he is the assistant secretary of the said Pacific Surety Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of California; that said company has complied with the provisions of the act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of German Savings and Loan Society is the corporate seal of the said Pacific Surety Company, and was thereto affixed by order and authority of the board of directors of said company; that he signed his name thereto by like order and authority as assistant secretary of said company; that he is acquainted with Wallace Everson, and knows him to be the president of said company; that the signature of said Wallace Everson subscribed to said bond is in the genuine handwriting of said Wallace Everson and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company unincumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two hundred and fifty thousand dollars ($250,000.00).

Deponent further says that Herbert A. Gill residing at Washington in the District of Columbia has been duly appointed as agent of said company to accept service of process against said company in the judicial district of District of Columbia, and is authorized to

enter an appearance in behalf of said company, in any
593 action, suit or proceedings brought against it in said judicial district.

LYFORD SINCLAIR.

Sworn to, acknowledged before me, and subscribed in my presence, this twenty-seventh day of June, A. D. 1902.

W. B. BEAIZLEY,
[SEAL.] *Deputy Clerk U. S. Circuit Court, Northern District of California.*

594 Whereas, the Pacific Surety Company, a corporation duly incorporated under the laws of the State of California, has deposited with me its charter or articles of incorporation and the statement required by section 3 of the act of Congress approved August 13, 1894, entitled "An act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereon;" and has satisfied me that it has authority under its charter to do the business provided for in said act; that it has a paid-up capital of not less than $250,000 in cash or its equivalent, and that it is able to keep and perform its contracts;

Now, therefore, the said Pacific Surety Company is hereby granted authority to do business under said act in the said State of California, and is also granted authority to do business under said act beyond the limits of said State in any judicial district of the United States in which it shall first have appointed an agent conformably to the provisions of section 2 of said act.

JOHN W. GRIGGS,
Attorney General.

Department of Justice, Washington, D. C., November 25, 1898.

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *Dec.* 10, 1901.

The annexed is a true copy of an original authorization to do business, issued by the Attorney General under the act of Congress approved August 13, 1894.

Witness my hand and seal of the department.

[SEAL.] CECIL CLAY,
Chief Clerk.

595 *Quarterly Statement of the Pacific Surety Company.*

Head office, No. 326 Montgomery street, San Francisco, Cal.

MARCH 31ST, 1902.

Cash capital	$250,000.00
Surplus as to policy-holders	114,501.00
Total assets	364,501.00

Assets.

Loans on bond & mortgage, including interest due & ch'g'd	$107,313.88
Deposits in savings banks	35,860.49
Real estate (foreclosed loan)	4,000.00
United States bonds, market value	10,903.15
Other bonds " "	142,375.00
Stocks " "	33,260.50
Interest accrued	1,031.03
Cash in bank and company's office	12,691.66
Premiums in course of collection	17,064.39
	$364,501.00

Liabilities.

Capital stock	$250,000.00
Losses in process of settlement	7,500.00
Suspense	359.89
Reinsurance reserve	42,311.67
Net divisible surplus	64,329.44
	$364,501.00

SAN FRANCISCO, *June 27th*, 1902.

I, Lyford Sinclair, assistant secretary of the Pacific Surety Company, do hereby certify that the foregoing is a true and corret exhibit of the assets and liabilites of said company, made on the 31st day of March, A. D. 1902, and for the quarter ending on that day.

LYFORD SINCLAIR,
Ass't Secretary.

[SEAL.]

Indorsed: Filed Jul- 14, 1902. C. S. Reinhart, clerk.

596 In the Supreme Court of the State of Washington.

THE GERMAN SAVINGS AND LOAN SOCIETY, a Corporation, Plaintiff in Error,
v.
DORA MAY DORMITZER, WILLIAM L. TULL, and ERNEST B. TULL, Defendants in Error.

STATE OF WASHINGTON, } ss:
County of Thurston, }

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above-entitled cause, and that in pursuance of the writ of error heretofore filed herein, I herewith transmit the said transcript together with the original writ of error, the original citation and a copy of the bond and assignment of errors to the United States Supreme Court.

Seal of the Supreme Court, State of Washington.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Olympia, this 15th day of July, 1902.

C. S. REINHART, *Clerk.*

Endorsed on cover: File No. 18,632. Washington supreme court. Term No. 404. The German Savings and Loan Society, plaintiff in error, *vs.* Dora May Dormitzer, William L. Tull and Ernest B. Tull. Filed July 30th, 1902.

FILE COPY.

No. 104

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

Supreme Court, U. S.
FILED
APR 11 1903
JAMES H. McKENNEY,
Clerk.

THE GERMAN SAVINGS AND LOAN SOCIETY,
PLAINTIFF IN ERROR,

vs.

DORA MAY DORMITZER, WILLIAM L. TULL AND ERNEST B. TULL,
DEFENDANTS IN ERROR.

Brief for Plaintiff in Error Upon Motion to Dismiss or Affirm.

E. C. HUGHES,
W. W. HINDMAN,
W. S. GOODFELLOW,
Counsel for Plaintiff in Error.

Filed ..... *1903.*



SUPREME COURT OF THE UNITED STATES.

No. 404.

October Term, 1902.

THE GERMAN SAVINGS AND LOAN SOCIETY,
Plaintiff in Error,

vs.

DORA MAY DORMITZER, WILLIAM L. TULL and ERNEST B. TULL, Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR

Upon Motion to Dismiss or Affirm.

In this cause two motions to dismiss or affirm have been noticed and separate briefs have been filed in support thereof. One motion is by Mr. Howard as "counsel for defendants in error"; the other is by Mr. Dewart as counsel for one only of the defendants in error, namely, Ernest B. Tull, a minor.

The grounds of the two motions are not entirely alike. In that of Mr. Howard the grounds are shortly that no federal question is *necessarily* involved; that the federal question is frivilous, and if there is such a question it has been correctly decided by the State Court; that a question other than federal was decided by the State Court against the plaintiff in error, which question alone is sufficient to sustain the judgment; that the matter decided was the ownership of property and it was so decided independently of the Kansas decree of divorce, to which, the plaintiff in error alleges, due faith and credit was not given.

In Mr. Dewart's motion the grounds are, that no federal question was set up or claimed; that the judgment of the State Court may be sustained upon a ground not federal in character; and that if there was a federal question it was correctly decided.

It is apparent therefore that Mr. Dewart assigns on behalf of the minor defendant a ground for dismissal which is not assigned by the other defendants in error, namely, that the alleged federal question was not specially set up or claimed. In other respects all the grounds of the one motion are embraced within the other. The ground of motion specially assigned by Mr. Jewett will first be treated of by us; all other grounds will be treated of as common to all the defendants in error.

As to the facts of the case. We may say, that in our opinion both in the decision of the Supreme Court of the State of Washington and in the briefs of counsel in this Court the actual facts of the case are obscured by repetition at great length of allegations of the defendants in error contained in their pleadings in the Superior Court at Spokane, which allegations were denied by the answer of the plaintiff in error, and not proven, and in copying allegations from pleadings in other cases to which this plaintiff in error was not even a party. *It is essential to a correct apprehension of this case that what was proved should be carefully and clearly distinguished, from what was alleged.*

From our point of view a statement of the case may be correctly and shortly given as follows:

The plaintiff in error is a Savings and Loan Society or Savings Bank, incorporated in California. In this litigation it has been generally referred to as the "Society." At the times in question it was making loans upon mortgage of real estate in the State of Washington. It would seem that its president and secretary were accustomed to examine for themselves the character of the security upon which loans were to be made, and to establish in cities, arbitrary limits within which they would be willing to make loans. (Trans., p. 189.) In this case F. M. Tull, the father of the defendants in error, made application for a loan upon the real property in question situated in the town of Spokane. The application was made in writing through B. Goldsmith, who resided at Portland; he was the appointee or statutory agent of the Society in the State of Oregon for the purpose of accepting service of process in that State pursuant to a requirement of its laws. We claim that Goldsmith throughout this transaction acted as a broker for a commission of $1200, to be paid to himself and one Cutter, by Tull, the applicant for

the loan, and that Goldsmith was not the agent of the Society in any respect, and that notice or knowledge upon his part of any facts material to this controversy are not imputable to the Society.

The application of Tull for a loan upon the property was accepted by the Society, whereupon proceedings were had to satisfy it as to the title and to execute the necessary mortgage and other papers. As was customary, the applicant for the loan was required to furnish an abstract of title. Such abstract was delivered to Messrs. Cox, Teal & Smith, attorneys and counselors, at Portland, Oregon. Upon examination of the abstract they issued their certificate as to the sufficiency of the title, upon faith of which the Society made the loan. All the expenses of obtaining the abstract and the certificate of counsel were borne by the applicant. The Society had selected and designated Messrs. Cox, Teal & Smith as Counsel whose certificates would be accepted by it. The fees of counsel were paid not by the Society but by the borrower; in this case it appears that they were paid by Goldsmith and Cutter, the brokers, out of their commission, pursuant to an agreement to that effect with Tull, the applicant. We contend, if the question be material, that any knowledge acquired by Messrs. Cox, Teal & Smith, is not imputable to the Society. They were not its agents, nor occupied any position different from that of Title Insurance or Guaranty Companies who are accustomed to issue certificates or policies insuring title to real estate. It does not appear, however, that Messrs. Cox, Teal & Smith did acquire any information as to this title other than such as they acquired from the abstracts of the public records, and we submit that the public records, copies of which are in this transcript, show a title in F. M. Tull which cannot be successfully attacked. These records include a probate sale of the interest of the defendants in error, which probate sale is in all respects regular upon its face. The guardian's deed recites payment of the purchase money.

But prior to this loan being consummated a difficulty had arisen in respect to the title. After F. M. Tull had made his application to the Society and the same had been accepted Lucy A. Tull his wife died. According to the laws of the State of Washington, property acquired by

husband and wife subsequent to their marriage (with certain exceptions) is community property, and upon the death of the wife one-half of such property vests in her heirs. The heirs of Lucy A. Tull in this case are the three defendants in error. Upon the death of the wife it seems to have been assumed by F. M. Tull, or those advising him, that some proceedings in respect of his children's interests would be necessary in order to make a title satisfactory to the Society. Mr. Tull engaged the services of Mr. Graves, an attorney and counsellor at Spokane, and the proceedings in the probate court for the appointment of a guardian for the children and the sale of their interests in this property were conducted by Mr. Graves. The guardian appointed was the brother of F. M. Tull, the applicant. It is apparent that Mr. J. M. Kinnaird, also an attorney and counsellor, conferred or co-operated with Mr. Graves in the conduct of these proceedings. It is positively denied by the Society that Mr. Kinnaird acted in anywise on its behalf. We submit that there is no evidence to show that he did, but that on the contrary it is reasonably certain that he was employed by Mr. Goldsmith and Mr. Cutter on their behalf and in aid of their contract for commissions to procure the abstract of title, and incidentally to assist in perfecting the title to the end that it should be acceptable to Messrs Cox, Teal & Smith. There is some evidence tending to show a correspondence of some character between Mr. Kinnaird and Messrs. Cox, Teal & Smith. If it be assumed that it related to this transaction the most that can be conjectured or inferred is that he inquired of them as an abstract proposition what character of title would be satisfactory to them. It surely appears that this was some time prior to their being engaged in the actual examination of the abstract for the purpose of a loan by the Society. There is no evidence to show what information, if any, they obtained, nor that it was present to their minds when subsequently examining the title, or that the information was acquired by the same member of the firm who subsequently made the examination.

Upon faith of the certificate of Messrs. Cox, Teal & Smith, the loan was made and subsequently renewed, and additional loans made; finally the mortgages were foreclosed and the Society acquired title to the property.

Thereafter two of these defendants in error commenced this action in the Superior Court at Spokane making the minor a defendant in said action. The minor appeared therein and filed a cross-complaint against the Society. The claims of the defendants in error in their complaint were that F. M. Tull had not paid in cash the purchase money when he purchased from their guardian their interest in these premises, but had given a mortgage to the guardian therefor; that the guardian had released the mortgage without receiving payment in fact; wherefore, they claimed that their mortgage was still a valid lien upon the premises, and they asked to have it foreclosed as such and to set aside the release thereof appearing of record. They claimed that the Society had notice of their mortgage being released without payment, and claimed that such release was "pursuant to a conspiracy made and entered into by the defendants F. M. Tull, P. D. Tull and The German Savings and Loan Society, some time in the year 1888 with the fraudulent purpose and intent, among others, of cheating and defrauding these plaintiffs and their brother" (Trans., page 6). The plaintiffs in said action, defendants in error, then proceeded to allege that they and their brother were the owners of an undivided one-half interest in these premises and set forth in detail the proceedings for appointment of a guardian and the probate sale resulting in a guardian's deed being made to F. M. Tull. The prayer of their complaint was for a reinstatement of their lien and foreclosure of their mortgage and for general relief. The minor defendant in his cross-complaint set up the same things, but prayed in effect that the probate sale be declared to be null and void, and that he be adjudged to be the owner of his original interest in the premises, with the alternative if such relief could not be had, of foreclosure of the mortgage given by F. M. Tull to his guardian. To this complaint and cross-complaint the Society filed an answer denying all the material allegations of the plaintiffs and the cross-complainant, and also pleaded affirmatively that it had made this loan upon faith of the public records and the certificate of Messrs. Cox, Teal & Smith, and without notice or knowledge of the various matters complained of respecting the probate sale. The Society further pleaded that the three children of Lucy A. Tull never had any interest in these premises,

and in that behalf pleaded, firstly, that F. M. Tull and Lucy A. Tull were married March 3d, 1870, and from that time until the 20th day of May, 1887, "resided in and were actual bona fide householders, residents, inhabitants and citizens of the State of Kansas;" that on the 25th day of February, 1887, the said F. M. Tull commenced suit for divorce against his said wife in the District Court of Kingman County in the State of Kansas; that service of the summons was made upon the defendant in said suit and that thereafter, on the 20th day of May, 1887, the said District Court entered a decree of divorce by reason of which the said F. M. Tull and Lucy A. Tull became and remained single persons. The Society also pleaded the laws of Kansas relating to divorce and the constitution of the District Court, and also as to the property rights of husband and wife from which it appeared, among other things, that by statute "a divorce granted at the instance of one party shall operate as a dissolution of the marriage contract as to both, and shall be a bar to any claim of the party for whose fault it was granted in or to the property of the other." (Trans. page 46.) The Society pleaded that while in Kansas Tull had acquired property of large value; that after obtaining the divorce he brought the proceeds of that property into the State of Washington and used the same in the purchase of the property in question, whereby it became his separate property.

The Society also set up the laws of Kansas as to the rights of husband and wife in property acquired there and claimed, and contended that, apart from the divorce, F. M. Tull was the owner of that property, and that the property purchased in the State of Washington here in question was also his separate property and not the community property of himself and wife.

As a further defense, the Society set up the proceedings in probate and claimed that the same were effective to divest the children of all interest in these premises. It also set up the fact that F. M. Tull had commenced a suit against his children and their guardian asking the Court to adjudge that the notes and mortgages which he had given to the guardian were without consideration, and were executed under a mistake as to their title, etc., and that the Court had issued an injunction which was still in force. At the time of the trial of this action it appeared that the action of F. M. Tull had been dismissed.

The plaintiffs in the Superior Court and the minor cross-complainant therein filed replications according to the State practice and in response to that portion of the answer of the Society which set up the Kansas decree of divorce the replications made admissions and statements which are material to be considered upon this writ of error. Although this transcript contains but one replication, it is apparent that there were two pleadings filed of that character. (Transcript of Record, pages 60 and 317.) From page 70 it would appear that an amended answer of the Society was filed at the trial and that an order of Court was asked that the original replication stand, and that the defendants in error might file a further reply if so advised. In the opinion of the Supreme Court of Washington (Trans., page 317) it is said these additional replies are to be construed "as part and amendatory of the replies theretofore filed."

In none of these replies did the defendants in error plead that the Kansas decree of divorce was void by reason of the matters upon which the Supreme Court of Washington has based its decision. On the contrary, in the first of their replies (Tr. p. 314) they expressly admitted "that F. M. Tull and Lucy A. Tull were intermarried and became husband and wife on March 3rd, 1870, and *resided in Kansas up to and prior to May 20th, 1887.*" They also alleged (p. 315) that the divorce had been procured by *fraud* practiced upon the wife; that no process was ever served upon her; "that *about the first day of May, 1887, F. M. Tull and Lucy A. Tull left the state of Kansas and never thereafter resided in said state*, and that just before leaving and when in the act of boarding a railroad train, some person, to her unknown, handed her certain papers; that before she could read or examine the papers they were taken from her by her husband who said he knew what the papers were and would attend to the same," etc.; that she never knew what the papers contained until two months thereafter when she was informed that the same was a complaint for divorce. As soon as she discovered that such divorce had been obtained, she commenced an action in the state of Washington to recover a half interest in this property and to have it adjudged that the divorce had been obtained by fraud, etc. For further reply the defendants in error alleged (Tr. p. 317) that F. M. Tull and

Lucy his wife, were married in 1870 and remained husband and wife until July, 1888, when the wife died. They deny knowledge sufficient to form a belief as to whether or not a divorce was granted, and deny every allegation contained in paragraphs 5 and 6, etc.

As the result of the trial in the Superior Court at Spokane findings of fact and conclusions of law were made and filed in favor of the Society and the same are set forth at length in the brief filed by the defendants in error then appellants in the Supreme Court of the State of Washington; copies of the briefs we understand have been certified by one of the defendants in error to this court. Upon their appeal, the judgment of the Superior Court was reversed and final judgment ordered in favor of all the defendants in error for a one-half interest in the property; to reverse which judgment this writ of error has been sued out by the Society.

The foregoing statement of course includes many matters which are not the subject of review by this Court, but it is material that the whole case be understood particularly in view of the question whether or not the judgment of the State Court may be sustained upon a ground not federal in character.

ARGUMENT.

Proceeding now to a consideration of the motion to dismiss, made by the minor defendant in error, on the ground that no federal question was set up or claimed, we would make response thereto as follows:

(*a*) In point of fact such federal question was set up and claimed towit, firstly, in the amended answer filed in the Superior Court. The mere setting up of a judgment of a court of a sister State, and asking that effect be given to it, introduces a federal question. A reliance upon the Constitution of the United States is necessarily involved. It has never been held that any set phrase of words is required to set up or claim a federal right. If this Society had gone further and annexed to its answer a copy of the Constitution of the United States or of this particular paragraph of the Constitution, it might have been informed by the Superior Court that it is the office of pleadings to allege facts, and that the courts are supposed

to know the law, and particularly the most familiar provisions of the fundamental law of the United States.

But we are not without authority upon this point. In the case of *Des Moines Navigation & R. R. Co.* vs. *Iowa Homestead Co.*, 123 U. S., 552, it would seem that the party went no further than to plead the judgment relied upon, and upon appeal to the Supreme Court of Iowa from a judgment against it, the party assigned as error simply that "the Court erred in holding that plaintiff was not estopped from prosecuting this suit by the former adjudication", etc. (123 U.S., 554). The Supreme Court of Iowa refused to pass upon the question and was reversed by this Court upon a writ of error as having, in effect, decided against the federal right "*which was actually set up and claimed*" (page 555).

It would seem that in the case of *Huntington* vs. *Atrill*, 146 U. S., the party merely pleaded the judgment of the sister State, and that the federal question was first mentioned by one of the dissenting judges in the Court of Appeals. This court upon writ of error said (146 U. S., 666):

"The question whether due faith and credit were thereby denied to the judgment rendered in another State is a federal question, of which this court has jurisdiction on this writ of error."

(*b*) Upon the trial of the case in the Superior Court a transcript of the record of the Kansas decree was offered in evidence, whereupon objection was made to it upon the part of the defendants in error, and Mr. Hughes, counsel for the Society, then said, among other things, "it is certified by the Clerk and the Judge in the manner provided by the act of Congress. The question is one, too, that goes back to and reviews the hearing upon demurrer", etc. (Trans., bottom page 201.)

The court and counsel were then surely advised that the Society claimed full faith and credit for this record under the Constitution and act of Congress, and from what was said as to a hearing upon demurrer, it must be inferred that the matter had previously been argued upon demurrer to that portion of the answer.

The record which was then introduced in evidence was certified in accordance with the Act of Congress. This was a manifestation of the purpose of the plaintiff in error to

rely thereon. It was long ago decided by this Court (14 Wallace, 238) that in order to avail one's self of the right to full faith and credit, the transcript must be certified in the manner provided by the Act of Congress. The matters herein mentioned were of course presented to the Supreme Court of the State of Washington, being a part of this record, which went up to that Court from the Superior Court.

(*c*) Again in the brief filed in the Supreme Court of the State of Washington, at page 82, will be found a quotation from the decision of the New York Court of Appeals in *Kinnier vs. Kinnier*, 45 N. Y., 535, reading as follows:

"But, aside from this consideration, we have a judgment rendered nearly sixteen years ago, of a court of one of the States of the Union having jurisdiction of the general subject matter of the action, which decrees a divorce of the marriage contract between the defendant and her former husband. I think such a judgment is protected by the Constitution of the United States, which declares that 'full faith and credit shall be given each State to the public acts, records and judicial proceedings of every other State.'"

To which was appended a statement of counsel as follows:

"The court held, after a thorough examination, that under those conditions, the decree rendered in Illinois could not be collaterally attacked. There is a great similarity between this case and the one now before this court. The divorce was granted in the State of Kansas in 1887, nearly thirteen years ago. It recites the jurisdiction of the court of both the parties and subject matter of the action, and therefore should not at this time be permitted to be collaterally assailed."

Surely the attention of the Court was here called to the full faith and credit clause which was recited verbatim.

It must at all times be remembered that the judgment in the Superior Court was in favor of the Society, it was not the appellant assigning errors to the Supreme Court.

Having regard to the thoroughly well-known and understood provision of the Constitution in question, we think the foregoing was sufficient to and did call attention of both of the state courts to the rights claimed. It is impossible to conceive of anything more being required when

the full faith and credit clause is relied upon. In other cases, as for instance the impairing of obligations of contracts, although the provisions of the Constitution may be thoroughly familiar to the court their application may not be apparent. But one who pleads a judgment necessarily relies upon it and claims rights under it, and when the judgment is that of a sister state, and the question is whether or not it shall be given effect, one cannot conceive of any court forgetting or overlooking the mandate of the Constitution.

(d) But according to the more recent decisions of this Court, the original strictness of the rule requiring the federal right to be specially set up and claimed even in cases other than those involving the full faith and credit clause, has been relaxed. And now it appears to be well settled that all that is necessary is that there shall be "something in the case" showing that the purpose of the Statute has been fulfilled, by the federal question having been in fact brought to the attention of the Court. And if it appear that the federal question has been entertained and decided by the State Court, that is of itself sufficient.

In the case at bar it was said by the Supreme Court of Washington (Tr. page 348), "This divorce record is plead and introduced in evidence, and effect is sought to be given to it by virtue of Section 1, Article IV, Constitution of the United States and the Laws of Congress, to give full credit to the records of sister states." And at page 342 it was said the Society had introduced in evidence "a record of said divorce proceedings authenticated as required by the laws of the United States," and again on the same page it was said, citing *Trowbridge* vs. *Spinning*, that upon the question of jurisdiction arising under the full faith and credit clause of the constitution, the state court would take judicial notice of the laws of Kansas.

We consider it unnecessary to quote largely from decisions of this Court, with which its members must be familiar. We refer to *Missouri, etc.* vs. *Elliott*, 184 U. S., 534, in which it was said:

"It is equally true that even although the allegations of federal right in the State Court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a federal nature was brought to the attention of the state

court, yet if the state court in deciding the case has actually considered and determined a federal question, although arising on ambiguous averments, then a federal controversy having been actually decided, the right of this Court to review obtains. *Oxley Stave Co.* vs. *Butler*, 166 U. S., 648, 660. All that is essential is that the federal questions must be presented in the State Court in such a manner as to bring them to the attention of that tribunal. *Chicago, &c. Ry. Co.* vs. *Chicago*, 166 U. S., 226. And of course where it is shown by the record that the State Court considered and decided the federal question, the purpose of the Statute is subserved. And so controlling as to the existence of the federal question is the fact that it was actually considered and decided by the State Court, that it has been held, although the general rule is that the raising of a federal question in a petition for rehearing in the highest court of the State is too late, yet when a question is thus raised and it is actually considered and decided by the State Court, the right to review exists. *Mallett* vs. *North Carolina*, 181 U. S., 589, 592."

In the case of *Tullock* vs. *Mulvane*, 184 U. S., 497, 503, the following language was used: " * * * were expressly considered and directly passed upon by both the trial court and the Supreme Court of the State of Kansas, *which latter fact in and of itself suffices* to present the federal question even if it had been otherwise ambiguously raised upon the record, which is not the case." (Italics here and elsewhere ours.)

In *Sweringen* vs. *St. Louis*, 185 U. S., 38, 45, 46, it was said: "We do not hold it was necessary to *plead* the claim in order to show it was specially set up, but it must have been so referred to and mentioned as to show that it was present in the minds of the parties claiming the right, or must have been in some way presented to the Court."

In *Home for Incurables* vs. *New York*, 23 Sup. Ct. Rep., 84, it was said: "Later cases in this Court have expressed the additional thought that if the highest court of the State assumes that the record sufficiently presents a question of federal right and decides against the party claiming such right, we will look no further and will proceed to a consideration of that question, unless the decision is made to rest in part upon some ground of local law sufficient enough in itself to sustain the judgment independently of any question of federal right."

And in the case of *Johnson* vs. *New York Life Ins. Co.*, 23 Sup. Ct. Rep., 194, 195, it was said: "Conceding that it was unnecessary to set it up in any *pleading* anterior to the trial, since it could not be claimed that the right had been denied to her until the trial took place, it was clearly her duty to make the claim either on the motion for a new trial, or in the assignments of error filed in the Supreme Court of the State. In neither does it appear, nor is there any allusion to it in the opinion of the Supreme Court. It first appears in the petition for a writ of error from this court. This is clearly insufficient."

The application of the decision last referred to to this case will be apprehended when it is remembered th at the decision was in favor of the Society in the Superior Court and that it was the respondent in the Supreme Court, and that the decision of the Supreme Court here complained of was the first occasion in which the federal right claimed was actually denied.

We therefore submit that the motion to dismiss upon the special ground assigned by the minor defendant in error should be overruled.

The next ground of the motion is that there was no federal question necessarily involved because there was another ground, non-federal, sufficient to sustain the judgment.

In none of the briefs, as we read them, is it denied that apart from such other ground the refusal of the State Court to give effect to the decree of divorce does present a federal question which this Court has jurisdiction to determine. We therefore proceed to discuss the question whether or not there was such an additional ground, non-federal in character, sufficient to sustain the judgment.

In this behalf the defendants in error refer to that portion of the opinion of Mr. Justice White, of the Supreme Court of Washington, which is to be found on page 360 of the Transcript, that if the presumption then being referred to did not control, "we think that the respondent is estopped from disputing the title of these children." It is argued that this estoppel is itself sufficient basis of title by which the claims of the defendant in error to the premises in dispute may be sustained.

As all the essential elements of an estoppel in pais are absent from the case, it would be startling if such effect could be given to the opinion of Mr. Justice White. We respectfully insist that if the opinion be read as a whole it will be found that the Washington court did not entertain any such idea of the law of estoppel, and did not intend to hold that even if effect were given to the decree of divorce, the children would nevertheless be the owners of the property.

It will be remembered that the Society had set up different defenses. Among others, that by the decree of divorce Lucy A. Tull had been debarred of all interest in the husband's property in Kansas, with the proceeds of which property the demanded premises were purchased. Also, and independently of the divorce, that by the laws of Kansas there was no community property, but that all the property belonged to the husband, and in like manner that the demanded premises having been purchased with the proceeds of the Kansas property Lucy A. Tull never had any interest therein. In the trial court the Society had called as an expert witness Mr. Crow, who had been a practicing lawyer in Kansas, and who produced two volumes of the statutes of that State. From these statutes it appeared that the common law prevails except in so far as it has been modified by statute; as we think it may be gathered from the other statutes introduced in evidence that there is no such thing as community property in Kansas, but that the wife has the old right of dower. Mr. Justice White, in his opinion, however, held that the evidence does not show that there is no law of community property in Kansas, and held that in the absence of proof to the contrary it must be presumed that the laws of Kansas are the same as those of the forum. Accordingly, he concluded that the "*presumption*" created by the laws of Washington to the effect that all property acquired subsequent to marriage was community property, had not been overcome by the Society. It was in this connection that he used the language so desperately seized upon by the defendants in error on this proceeding. Giving the language a general meaning, it is not unreasonable If it was left in doubt *merely as a question of fact* whether this was community property, the conduct of the parties treating it as such would be competent and per-

suasive testimony, but to hold in the legal sense that although the children never had any original right to these premises they could acquire such right under the doctrine of estoppel because the Society had supposed or assumed, out of abundant caution, (p. 127), that they had such right, would involve an absurdity, and an announcement of general principles of law to which no Supreme Court in this nation would subscribe. It would be a sheer waste of energy to find for this Court authorities on a proposition so elementary. One of its former members in his earlier years, when Chief Justice of the Supreme Court of California, said in the case of *Biddle-Boggs* vs. *Merced Mining Co.*, 14 Cal., 279, 367, et seq.): "But to the application of this "principle with respect to the title of property, it must "appear, *first*, that the party making the admission by "his declaration or conduct, was apprised of the true state "of his own title; *second*, that he made the admission with "the express intention to deceive, or with such careless "and culpable negligence as to amount to constructive "fraud; *third*, that the other party was not only destitute "of all knowledge of the true state of the title, but of "the means of acquiring such knowledge, and, *fourth*, "that he relied directly upon such admission, and will be "injured by allowing its truth to be disproved. These "qualifications in the application of the doctrine will be "found fully sustained by the authorities. *There must be "some degree of turpitude in the conduct of a party before "a Court of Equity will estop him from the assertion of his "title—the effect of the estoppel being to forfeit his property "and transfer its enjoyment to another.*"

And quoting from a Pennsylvania case, further said:

"To the constitution of this species of estoppel, at least three ingredients seem to be necessary: first, misrepresentation or willful silence by one having knowledge of the fact; second, that the actor, having no means of information, was, by the conduct of the other, induced to do what otherwise he would not have done, and thirdly, that injury would ensue from a permission to allege the truth. *And these three things must appear affirmatively.*"

The judgment of the Supreme Court of Washington, if given the effect claimed for it by the defendants in error, would be in direct conflict with elementary principles of

law. Upon this consideration alone it should be refused such an interpretation by this Court.

Maguire vs. *Tyler*, 8 Wall., 650–665.
Klinger vs. *Missouri*, 13 Wall., 257;
Johnson vs. *Risk*, 137 U. S., 301.

As further proof that the Supreme Court of Washington did not intend to render judgment in favor of these defendants in error upon the independent ground of estoppel, this Court is respectfully referred to the former portion of the opinion of that Court treating of the Kansas divorce, Transcript pages 342 et seq., covering over seven pages of the record. As we think, throughout that opinion it is manifest that the Court considered the Kansas divorce an absolute bar unless it could in some manner be avoided. There is no suggestion that the effect of the divorce could be avoided upon the principle of estoppel by conduct on the part of the Society. At the outset (page 342) it is said the Society claims that by operation of the Kansas decree the wife and those claiming under her are barred of any claim in or to the property of the husband, and that the property in controversy was purchased with money of the husband owned by him at the time of the divorce. The law of Kansas is then quoted at length to the effect that the divorce *is* a bar against the guilty party of all property claims.

The labor and effort expended in discussing the Kansas divorce and reaching a conclusion as to its effect, is manifest upon even a casual reading of the seven pages. A bare majority of the Court subscribed to the opinion, two judges dissenting. We cannot believe that any of the judges were entirely satisfied. Resort was had to the ex parte complaint filed by Lucy A. Tull which the lower court had refused to receive in evidence. The most technical scrutiny was given to the record. It was held that the divorce laws of Kansas had not been complied with because no *affidavit* of service of summons appeared in the record. The Society had set up in its answer such law and shown the necessity of such an affidavit, and apparently no question had been made by any one as to the existence of such an affidavit. (The briefs show the contrary, Appellants p. 50, Respondents p. 83.) As may be seen from page 46 of the petition for rehearing, the record

in the court below *did* contain such affidavit of the Sheriff of Sacramento county sworn to April 2d, 1887, before the County Clerk of that County, and in the petition for rehearing a copy was set out verbatim, and it was said (page 48) that if the record, as certified to the Supreme Court, fails to contain the affidavit "it is a mere clerical oversight in copying."

Is it possible that the Supreme Court of Washington knew and believed during all this time that the Kansas decree and all questions appurtenant thereto were immaterial, and that the whole case could be and would be decided and disposed of in a few lines upon another and independent ground?

In these days appellate courts are generally overworked; and it is their duty as well as their privilege to dispose of cases as easily and speedily as possible. There is not usually much complaint that this privilege is not availed of by the judges; the inclination to establish a short circuit is not confined to the natural forces.

Again the constitution of the State of Washington requires its Supreme Court to state the reasons of its decisions. The purpose of the requirement is self-evident. Under the test of that constitutional provision if the Judges had been required to furnish reasons before giving such a decision, the one would have been as impossible as the other. Again, if this was the ground of decision, it is unsupported by the pleadings. It is found neither in the original complaints nor in the replications. A judgment under such conditions involving so much property would be a novelty if not a nullity. In the same Biddle-Boggs case above referred to, Judge Field said (14 Cal. 356): "The court cannot properly, even upon the consent of parties, pass upon questions not raised by the written allegations of the pleadings," and Mr. Justice Brewer, in the case of *Reynolds* vs. *Stockton*, 140 U. S., treated in unmistakable language, the same subject. It is true, as stated in Mr. Dewart's brief, that the defendants in error did claim that the Society was estopped, not however, in their pleadings, but in their Brief on Appeal, but, as we submit, this record shows that the main reliance of these defendants in error throughout the case was that their mortgage lien should be foreclosed. In an action of *that* character the claim of estoppel might not be

so unreasonable. It might fairly be argued that F. M. Tull should be estopped to deny the validity of the mortgages, or to say that they were without consideration because the heirs had no title and therefore none passed under the probate sale. The general rule is that judicial sales are without warranty, and that the purchaser must know at his peril that in exchange for his purchase money he will take only such title as the defendant in the execution may have had, and it may be that he will take nothing. A mortgagee under such conditions may be concluded, but we have never heard that a grantee of real property is estopped from denying, if need be, that his grantor ever had any title; and to go further and say that the grantee is not only estopped by the deed, but that if it turns out that the deed is itself void, he not only loses his property, but by process of estoppel transfers his own true title to his original grantor who otherwise never had any title, together with, as in this case, one-half of $120,000 worth of improvements—is to travel beyond the confines either of reason or of law.

Assuming the Kansas divorce to be out of the case, and that the parties at all times were husband and wife, there was still some question as to the community character of this property; there was some evidence introduced that the wife had herself three hundred dollars in money and a farm in Missouri which was sold for one thousand dollars; there was also a controversy as to when Tull acquired title to the property in Washington, whether before or after he and his wife ceased to be residents of Kansas and subject to the laws of that State regulating property rights of married persons. If they were residents of Washington when the property was purchased, being real property it would take its character from the laws of Washington. Prima facie it would be community property. The burden of proof would be upon any one contending for the contrary to show what money was used to purchase the property and what was the law of Kansas which made that money the separate property of the husband. The presumption had also been applied that in the absence of proof the property laws of Kansas must be the same as those of Washington. Upon all such questions the conduct of the parties might well be considered as competent but not conclusive testimony. It was also

said by the Supreme Court that Tull and his wife had agreed as to the status of the property before her death, and this status was recognized by the respondent. It seems impossible that the Supreme Court should have been considering original rights of property. The alleged agreement was wholly indefinite and was by parol. If Lucy A. Tull had been divorced and had lost all her property rights, she could not acquire them again in that way.

The respect due to the Supreme Court of Washington from some of these defendants in error and from some of their counsel should *estop* them from asking that its opinion be given such a construction.

Finally, we respectfully insist that the opinion shows upon its face that nothing of the kind contended for by the defendants in error was officially determined. The concluding language of the opinion is "*but* the *presumption* that it was community property not having been overthrown, *it is not necessary to further comment on the effect and character of this estoppel.*" From this it appears that the court rested its decision upon the presumption of community property. Of course this means, apart from the effect of the divorce, if there was one; and, especially in view of the constitutional mandate, the concluding words of the opinion must be read as saying that it was not *necessary* to decide, and that the court did *not* decide, upon the effect of the estoppel *even as applied to the question of community property apart from the effect of the divorce.*

We are content to leave this branch of the case without further discussion.

It now remains to answer the alternative motion to affirm on the ground that even if this Court has jurisdiction the case presented is frivolous and taken for delay.

We are disposed to think we have already made a sufficient *prima facie* case, which is all that is required upon this preliminary motion. In one of the briefs there is a heading "findings of fact", and in the other it is said that although the Supreme Court of Washington did not make "formal findings of fact" it did find in its opinion, etc. The current of thought appears to be that if the case was decided upon questions of fact it will not be reviewed upon this writ of error.

We do not agree with the premises which counsel have laid down. The Supreme Court of Washington is essentially a court of appeal. (See Constitution, Appendix A.) It does not in any case hear testimony or try a case *de novo* although it is provided by Statute, (Ballinger's Code, 6520. See Appendix B.), "In actions, legal or equitable, tried by the court below without a jury, wherein a statement of facts or bill of exceptions shall have been certified, the evidence of facts shown by such bill of exceptions or statement of facts shall be examined by the Supreme Court *de novo* so far as the findings of fact or a refusal to make findings based thereon shall have been excepted to, and the cause shall be determined by the record on appeal, including such exceptions or statement."

What is found in the opinion of the Supreme Court here is matter of legal decision, in review of the action of the lower court. Findings of fact are made by courts from whose judgment an appeal lies; their office being to simplify the examination of the case upon appeal. We contend that the findings of fact in this case were made by the Superior Court at Spokane, and were in our favor.

We do not dispute the general principle that a writ of error brings up questions of law and not of fact, but if the necessity of the case should so require we would contend that when relief is sought from this court on account of a refusal of a State Supreme Court to give to a party his constitutional rights, this court will not permit itself to be foreclosed by any findings of law or fact made by the State court, but will examine for itself the whole case as it was presented to that court. Whether or not full faith and credit has been given to a sister State's judgment in any given case is a question for this court to decide; it is a legal question and an entirety. We do not know at present of any case in which this question has been involved. There are many in which this court has said that when rights under the Constitution are claimed to have been denied, it will not consider itself bound by the construction placed upon a contract or state statute by the highest court of a State.

In *Dower* vs. *Richards*, 151 U. S., 658, cited by defendants in error, it was said at the top of page 667:

"When indeed the qnestion decided by the State court is not merely of the weight or sufficiency of the evidence

to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of federal law, the decision may be reviewed by this court."

See also the extract from opinion of Mr. Justice Catron on the same page.

In *Jefferson Bank* vs. *Skelly*, 1 Black, 436, 443, it was said:

"Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of State legislation, or has been made by a covenant or agreement by the agents of a State by its authority."

In the case of *Laing* vs. *Rigney*, 160 U. S., 531, this court upon an issue of full faith and credit not only considered the evidence given in the court below, but apparently undertook to adjust the weight or quality of that evidence, and to hold against the testimony of the expert witness who was examined as to the laws of the State of New Jersey considered as a fact.

In the case of *Jacobs* vs. *Marks*, 182 U. S., 583, the syllabus reads:

"The question whether the record and judicial proceedings in the Michigan court received full faith and credit, in the courts of Illinois is one for this court to consider and determine; and it holds that, upon the facts disclosed in the record, the courts of Illinois did give to the judgment and judicial proceedings of the state court of Michigan full faith and credit, within the meaning of the Constitution."

However, in this case we feel confident that we can even within the most restricted limits prescribed by counsel for defendants in error, establish that due faith and credit was denied to the Kansas judgment, and without legal justification.

There was no issue of fact whatsoever tendered either to the Superior Court or to the Supreme Court in impeachment of the Kansas divorce, excepting only the existence of such a record; if therefore the Supreme Court decision be treated as a finding of fact, as to domicile, residence, fraud, service of summons, or authority of the attorney to ap ear, such finding was without the issue;—in the language of the Supreme Court of California (Morenhaut vs. Barron, 42 Cal., 591, 605) "*it was useless and idle.*" A final judgment of a court having conceded jurisdiction both of the parties and of the subject matter may be set at naught collaterally, because not responsive to the matters controverted. *Reynolds* vs. *Stockton*, 140 U. S., supra.

We beg to repeat also the remarks of Judge Field, 14 Cal., already quoted in this brief.

That the pleadings raised no issue as to the judgment of divorce except its mere existence, is clear as well from the decisions of this court as of the courts of the State of Washington. In *Hill* vs. *Mendenhall*, 21 Wall., 453, 454; after saying that the record of a sister State's judgment may be contradicted to the extent of showing want of jurisdiction, it was said by the Supreme Court of the United States,

"But if it appears on the face of the record that the court did have jurisdiction extrinsic evidence to contradict it is not admissible under a plea of *nul tiel record* * * * *nul tiel record* puts in issue only the fact of the existence of the record and is met by the production of the record itself, valid upon its face, or an exemplification duly authenticated under the Act of Congress * * * defects appearing on the face of the record may be taken advantage of upon its production under a plea of *nul tiel record, but those which require extrinsic evidence to make them apparent must be formally alleged before they can be proven.* This we believe to be in accordance with the practice of all courts in which such defenses have been allowed, and it is certainly the logical deduction from the elementary prin-

ciples of pleading. * * * It follows that upon the pleadings in this case, judgment should have been given for the plaintiff after proof of the record, showing as it did jurisdiction of the defendant by reason of his appearance by an attorney."

And in *Richie* vs. *Carpenter*, 2 Wash., 512; 26 Am. St. Rep. 777, the suit was upon a Kansas judgment. The Supreme Court said: "The judgment is pleaded in the third paragraph of the complaint; the denial thereto in the answer was as follows: 'The defendant denies the allegations containad in the third paragraph of plaintiff's amended complaint.'" He also denied, 2 Wash., 514 that the District Court in Kansas ever obtained any jurisdiction over the subject matter of any controversy between plaintiff and defendant, etc. He also denied that any cause of action in favor of plaintiff and against defendant ever existed, or was pending in said District Court, etc. He also denied that any cause of action between plaintiff and defendant was ever submitted to said District Court with the knowledge or agreement of the defendant, or any one acting for him, etc. The defendant having appealed the Supreme Court said:

"He also contends here, that as his affirmative defense was not replied to or denied by the plaintiff, that it must be taken as true, and that judgment should have been rendered in his favor thereon. It is doubtful whether the defendant's whole answer raised any other issue than that of *nul tiel* record, and this is the only defense available under a general denial in an action upon a judgment of a court of record of a sister State. The so-called affirmative defenses were denials in form, and nothing was pleaded therein alleging that the court had not jurisdiction of either the subject matter of the action, or of the defendant's person. The first paragraph of his further defense is the only one in any wise tending to show a want of jurisdiction of the subject matter, wherein it seems to deny that the Court had jurisdiction of anything. The first part of the second paragraph attempts to deny that the cause of action ever existed. These amounted to nothing more than statements of conclusions of law. The remaining part of this defense related to wholly immaterial matters. The affirmative defense could not have stood, had it been attacked in the Superior Court. *Pleas*

to the jurisdiction must be direct and certain, and set up the facts which go to show a want of it." Citing *Hill* vs. *Mendenhall*, 21 Wall., 453, and other cases.

The Court afterwards said in its opinion: "The main controversy in this case was as to what issues were raised by the pleadings, and as to where the burden of proof rested thereunder. The disposition made of the first point carries the second with it."

There can be no claim in this case that the absence of pleadings was waived by the Society. The transcript of the record will show on the contrary that objections were persistently made to questions as to Tull's residence and were overruled (see objections, top of page 205); such testimony was, however, competent for another purpose, towit: upon the independent issue of whether this was community property apart from the effect of the Kansas divorce, if there was one.

There was no evidence of fraud in obtaining the divorce, unless it be the ex parte complaint filed by Lucy A. Tull, to which objection was not only made, but was sustained. There was no testimony at all as to service of summons, or authority of the Kansas attorney to appear. As to this last question we would refer this Court to page 347 of the record, showing that the Supreme Court of Washington inferred that the attorney could not have been authorized, because his general denial to the divorce complaint "*denies her marriage to the plaintiff and the paternity of her children*"!

As we have seen, one of the replications expressly alleged that Tull and his wife "resided in Kansas *up to* and prior to *May 20th, 1887*" (Tr. 314.) Another replication alleged that about the *first day of May 1887*, Tull and his wife left Kansas, and when in the act of boarding the train she was served with process, etc. (Tr. 315.) These replications not only show residence in Kansas, but show service of summons. The divorce might have been set aside for fraud, but until so set aside it remains valid. It has been repeatedly held by this Court that sister state judgments cannot be collaterally attacked on the ground of fraud. 116 U. S. 1. 138 U. S. 459. 155 U. S. 13.

It should also be remembered that as between Tull and his wife this was not a foreign judgment, but a domestic judgment. The mere fact that she was without the terri-

torial limits of the State at the time of service of summons, even if she did not afterwards appear by attorney, makes no difference. Many cases may be cited. We content ourselves with referring to one: *Ousely* vs. *Lehigh Valley, etc.*, 84 Fed. Rep. 602, in which a money judgment recovered in a Canadian court upon service of summons upon a defendant in New York was held to be good by the Circuit Court of the United States in Pennsylvania.

The judgment of the Supreme Court of Washington is subject to attack in review of the evidence, and upon grounds which are well recognized as legal exceptions, to be considered upon writ of error; namely: that there is *no* evidence (at least none within the meaning of the modern rule), to justify the conclusion of the State Court that neither of the parties to the divorce suit had a domicile in Kansas; and that the evidence being undisputed, its *legal effect* was a question of law and was erroneously determined by the State Court.

There was no conflict in the evidence as to domicil or residence; F. M. Tull was the only witness on that subject; it is surprising how little evidence there is in the record as a basis for the opinion of the State Court.

We believe that upon the following pages of the transcript will be found all the testimony in the case having any bearing upon the point of domicil or residence, viz.: pages 75-78, 80, 108-114, 204, 205.

In fact all the evidence having a direct bearing upon the question of domicil may be comprised within a few lines.

F. M. Tull went first to Spokane in December, 1886 (page 75), and procured a contract for purchase of a part of this property, paying one hundred dollars on account; in the contract he is described as of Kingman, State of Kansas, (pages 76, 109). On page 77 he testified that prior to visiting Spokane he had sold out all his business and property in Kansas "with a view of hunting a location before he left home. I did not know where I would locate when I left home." After some traveling landed at Spokane and "made this purchase and located here." "I decided to locate here and came back here as soon as I could get here." After making the contract of purchase went back to Kansas and wound up my affairs there, preparing to come here as soon as I could get here. Returned some time in the spring. Returned in March or April.

Before leaving the first time had contracted for brick to erect a brick block on the property. Cannot fix dates; was in Spokane two or three times and went away again and then came back. "Was here at least two or three times that spring before I was ready to go ahead with the building on account of waiting for the brick to be burned." At page 109: "Was in business in Kansas for many years prior to coming to Spokane." (Page 110) Commenced building in May or June. (Page 111) That was in June, 1887. (Page 111, 113). The first time after the December trip was in the spring, about April. Stayed then "a few days, two or three weeks; something like that."

"Q. Came here to finish making arrangements for the building, then you went away from here. Where did you stop while you were here?

A. I think I stopped at the California House. That was a hotel.

Q. Were you alone when you came here?

A. Yes, sir.

Q. You did not bring your family with you?

A. No, sir.

Q. When you went away from Spokane, how long were you absent before you returned again?

"A. I returned some time in May, I think, **the last time to stay.**"

Q. I understand you to say, Mr. Tull, that you came here the last time, or returned the last time, in May?

A. Yes, sir; some time in May.

Q. Some time in May. After that time you remained here continuously during the time you were erecting the building which you mentioned; the first building?

A. Yes, sir.

Q. And getting ready to go into business?

A. Yes, sir.

Q. And that you went into business, or started into business I think, about August of that year?

A. Yes, sir; I came back here and stayed until the first of July. On the first of July I went East to buy my stock."

(Page 204) "Q. (Re-direct) When did your wife, Lucy A. Tull, leave Kansas?

A. Some time in March 1887—I don't mean March, I mean Jannary.

Q. Where was she in February, March and April, 1887?

A. I do not know where she was. She went to Missouri from Kansas, to her father's. I do not know where she was.

Q. Where was she on the 2nd day of April, or about that time?

A. I think she was in California; California some place, likely. I could not say the exact time she went there; some time in the spring. We did not go together. She came to Spokane in July, 1887."

The complaint of the wife not admitted in evidence in the trial court but considered by the Supreme Court, will be found at page 284 of the transcript.

It must be remembered that the original domicil in Kansas is conceded, and that the divorce decree is itself evidence of domicil to be overcome only by clear and satisfactory testimony. We submit that apart altogether from admissions in the pleadings, and lack of issues, the evidence adduced is wholly insufficient to show that the Kansas domicil had been lost by either the husband or the wife prior to May, 1887, at which time, as Tull says, he came to Spokane, "this time to stay." Prior thereto he had an unexecuted intention to locate in Washington after he had settled up his affairs in Kansas. It was not until May at the earliest when he came to stay that he took up his home and permanent abode in the State of Washington. It will be remembered that in his complaint in Kansas filed in February, he alleged under oath that he was then and for a long time had been a resident of the State of Kansas.

We do not understand the Supreme Court of Washington as holding the wife's complaint, at page 284 of the transcript, to be substantive testimony, but we will not pursue the inquiry. We are content to submit to this Court whether the faith and credit to which the Kansas judgment is entitled under the Constitution of the United States can be frittered away in such manner. Upon reading that complaint, however, we find its allegations rather tend to support than to destroy the validity of the divorce record in respect of domicil and residence. She states that the property in Kansas was sold in January or February, 1887; that about the 14th of February, she was prevailed upon to visit her father's home at Andover; that about March 7th, 1887, plaintiff and defendant went to Sacramento, California, upon his representation that he desired to make California his home (this was after the divorce

suit had been commenced.) That on or about April last the defendant returned to the home of the plaintiff in Sacramento" (page 287). "About the 11th of May he left the plaintiff at Sacramento to be gone for two weeks, pretending he was going to Kingman, Kansas, for the purpose of settling up some unfinished business, when he would join plaintiff within two weeks, all of which was false," etc. (page 288).

The testimony as to the Kansas divorce is meager in the extreme; some of the replications deny any information or belief on the subject. No effort appears to have been made to examine the Sheriff of Sacramento County or the attorney in Kansas who appeared in the divorce proceedings, or to procure any evidence to establish what the defendants in error now claim to be facts; of course in view of the pleadings, this lack of evidence cannot be attributed to the plaintiff in error.

Upon this branch of the case we respectfully insist that there is no evidence to warrant a holding that either of the parties had lost their Kansas domicil prior to the commencement of the divorce proceedings, and that the adjudication of the Kansas court in that behalf has not been overcome.

Upon these motions we do not notice the other assignments of error. We ask that the motions to dismiss or to affirm be denied.

Respectfully submitted,

E. C. HUGHES,
W. W. HINDMAN,
W. S. GOODFELLOW.
Counsel for Plaintiff in Error.

APPENDIX "A."

CONSTITUTION OF WASHINGTON.

ART. IV.

§ 1. JUDICIAL POWER, WHERE VESTED.—The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

§ 2. SUPREME COURT.—The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum and pronounce a decision. The said court shall always be open for the transaction of business except on non-judicial days. In the determination of causes, all decisions of the court shall be given in writing, and the grounds of the decision shall be stated. The legislature may increase the number of judges of the supreme court from time to time, and may provide for separate departments of said court.

§ 4. JURISDICTION.—The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before the superior court of the state, or any judge thereof.

APPENDIX "B."

BALLINGER'S CODE.

§ 6520. WHAT MAY BE REVIEWED.—Upon an appeal from a judgment, the supreme court may review any intermediate order or determination of the court below which involves the merits and materially affects the judgment, appearing upon the record sent up from the superior court. Any questions of fact or of law, decided upon trials by the court or by referees, in either legal or equitable causes, may be reviewed, when exceptions to the findings of fact or to the conclusions of law, or both, have been duly taken, by either party and sent up in the record on appeal; and in actions legal or equitable, tried by the court below without a jury, wherein a statement of facts or bill of exceptions shall have been certified, the evidence of facts shown by such bill of exceptions or statement of facts shall be examined by the supreme court de novo, so far as the findings of facts or a refusal to make findings based thereon shall have been excepted to, and the cause shall be determined by the record on appeal, including such exceptions or statement.

FILED [illegible]

SUPREME COURT OF THE [illegible]

October Term, 1906.

No. [illegible] 104

THE GERMAN SAVINGS AND LOAN SOCIETY,

Plaintiff in error.

vs.

DORA MAY DORMITZER, WILLIAM L. TULL AND ERNEST B. TULL,

Defendants in error.

In Error to the Supreme Court of the State of Washington.

BRIEF FOR PLAINTIFF IN ERROR.

E. C. HUGHES,
W. W. HINDMAN,
W. S. GOODFELLOW,
Counsel for Plaintiff in error.

SUPREME COURT

OF THE

UNITED STATES

THE GERMAN SAVINGS AND LOAN SOCIETY,

Pliantiff in error.

vs.

DORA MAY DORMITZER, WILLIAM L. TULL AND ERNEST B. TULL,

Defendants in error.

BRIEF FOR PLAINTIFF IN ERROR.

At the last term a motion to dismiss or affirm was made by the defendants in error, and briefs were filed by the respective parties.

As the motion was directed not only to the jurisdiction of the Court but to the merits of the case, the brief of the plaintiff in error presented a somewhat full argument on both subjects.

Upon a review at this time of the brief then filed we are content to adopt it as the brief of the plaintiff in error upon the present hearing, desiring to add thereto a reference to the following decisions which are not published at the time of writing the former brief, namely:

Mutual Ins .Co. vs. McGrew, 188 U. S. 311;
San Jose Land and Water Co. vs. San Jose Ranche Co., 189 U. S. 177.

In the first mentioned case, at page 311, there will be found the following:

"Where a judgment of another State is pleaded in de-
"fense, and issue is made upon it, it may well be ruled
"that that sets up a right under the third subdivision,
"because the effect of the judgment is the only question in
"the case, but here the plea of the decree of divorce and
"the statute did not necessarily suggest or amount to a
"claim under the treaty."

And the following is a quotation from the second case, 139 U. S. 179:

"While the right under the act of 1887, thus considered,
"was not originally specially set up and claimed by the
"plaintiff, inasmuch as it was not an original right, but a
"right available in rebuttal of the defense, it is one which
"appears to have been insisted upon in the argument; and
"under the rule of this court, requiring the opinions to be
"sent up with the record, it has been frequently held to be
"a sufficient compliance with the words 'specially set up
"and claimed,' that it was fully considered in the opinion
"of the court and ruled against the plaintiff in error."
(Citing authorities.)

Respectfully submitted,

E. C. HUGHES,
W. W. HINDMAN,
W. S. GOODFELLOW,

Counsel for Plaintiff in error.

IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 104.—October Term, 1903.

THE GERMAN SAVINGS AND LOAN SOCIETY,

Plaintiff in error.

vs.

DORA MAY DORMITZER, WILLIAM L. TULL AND ERNEST B. TULL,

Defendants in error.

PETITION FOR REHEARING.

To the Honorable, the Supreme Court of the United States:

On behalf of The German Savings and Loan Society, plaintiff in error in this cause, we respectfully petition for a rehearing.

Upon a careful consideration of the opinion of the Court recently delivered by Mr. Justice Holmes, we confess to a degree of unusual disappointment, in that the legal proposition to which nearly all of our oral argument was directed has not been decided, nor even noticed by the Court. In view of the decision in our favor upon other points of the case, we feel assured that if the proposition to which we refer had been considered and determined by the Court, the case must have been decided in our favor.

For convenience of reference we append hereto a copy of the opinion of the Court.

The motion to dismiss for want of jurisdiction has been denied, and the motion to affirm upon the ground that

another question, non federal in character, was involved, sufficient in itself to sustain the judgment of the State Court has also been disposed of. The one remaining question upon which the case depends is the validity of the divorce in Kansas, recovered by F. M. Tull against Lucy A. Tull, the ancestor of the defendants in error; as said by the Court in the opinion, "if that divorce is valid, *his wife's* interest in his property was gone."

On the subject of this divorce, the opinion reads as follows:

"It is too late now to deny the right collaterally to im-
"peach a decree of divorce made in another State, by proof
"that the Court had no jurisdiction, even when the record
"purports to show jurisdiction and the appearance of the
"other party. *Andrews* v. *Andrews*, 188 U. S. 14, 39; S. C.,
"176 Mass. 92, 93. An attempt was made to avoid the au-
"thority of *Andrews* v. *Andrews* by the suggestion that
"there the respondent in the divorce suit had disappeared
"before the decree. But a respondent cannot defeat juris-
"diction by disappearing. Indeed in strictness only the
"attorney disappeared, and the respondent simply ceased
"to defend the suit. The effect given to the statute of
"Massachusetts in that case depended wholly on contradict-
"ing the record of the divorce suit and proving the want
"of jurisdiction by proving the libellant's want of domicil
"in the State."

The opinion then holds that there was some evidence to warrant the finding of the Supreme Court of the State of Washington as a fact that the husband had abandoned his residence in Kansas and changed his domicil to Washington before the divorce suit was commenced.

But at the oral argument it was urged as an independent and additional ground for sustaining the divorce that the wife had put in issue and litigated in the Kansas Court this very question of the fact of domicil, and it was pointed out that the Supreme Court of Washington had entirely overlooked the legal proposition that in such a case she and all persons claiming under her were concluded as to that issue of fact upon the principle of res adjudicata.

It is true that almost at the outset of the argument a

question was addressed to counsel by Mr. Justice Holmes as to whether the case of Andrews vs. Andrews was not determinative of this case; and reply was made by counsel to the effect that in the Andrews case the defendant had not appeared, or rather had appeared and had afterwards withdrawn her appearance; but it was not the intention of counsel to rest the distinction upon the mere fact of Lucy A. Tull having appeared by an attorney in the Kansas Court. The argument proceeded at great length thereafter, to the point that by an *answer* in the case, which was a denial of all the allegations of the complaint she had put in issue the allegation of the husband as to his domicil in Kansas, and that the judgment upon its face shows that the case, including of course this essential issue, had been heard, tried and determined in the Kansas Court.

The case chiefly referred to upon the argument was *Ellis vs. Ellis*, 55 Min. 401, and the cases therein cited. The doctrine of those cases is to the effect that the parties, husband and wife, may be concluded by a trial of issues of fact in which they have taken part, or by a decree of divorce, although the government may not be so concluded, and that in criminal proceedings the divorce may be held to be invalid.

It may be remembered that subsequently Mr. Justice White suggested to counsel whether his line of reasoning would not lead to the result that parties might appear in court and obtain a valid divorce by consent; and reply was made in substance that a judgment by consent is a judgment of the Court merely that the parties have consented, and does not involve judicial hearing and determination. In this connection *Cromwell vs. County of Sac.*, was cited to the Court and reference made to the rules of res adjudicata established in this Court and elsewhere by that decision. Reference was also made to an early English case followed by the Supreme Court of California in *Garwood vs. Garwood*, 29 Cal., 514, to the effect that two persons appearing before an ecclesiastical court in a proceeding *in rem*, and there litigating a question of fact, are afterwards concluded by the decision of that fact. It may be remembered also that counsel for plaintiff in error for the purpose of emphasizing the controlling and peculiar effect of res adjudicata, asserted that although no one

would pretend that a Court could marry two persons, it could accomplish that ultimate effect, at least so far as property rights are concerned, by an erroneous judgment in a suit for jactitation of marriage. That although in the church or the household, or in society two persons may not be in fact so divorced or married, yet in courts of justice where property rights are concerned they may, by force of res adjudicata, *be conclusively deemed to be* so married or divorced. In *Jeter vs. Hewitt*, 22 How., 352, 364, will be found the following: "So deeply is this principle implanted in her jurisprudence, that commentators upon it have said, the res judicata renders white that which is black, and straight that which is crooked. *Facit ex curvo rectum, ex albo nigrum.* No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy."

As we have said, the opinion recently rendered does not even mention these legal propositions; we submit that they are sound in principle and are sustained by authority; if given effect they will be decisive of this case; and this consideration we urge as ground for rehearing.

In *Andrews vs. Andrews*, 188 U. S., apart from the Mass. Statute, the decision was in effect that the South Dakota divorce Court had no jurisdiction, because neither party was domiciled in that State. Following *Thompson vs. Whitman*, 18 Wall. and other cases, this Court held that when a sister state's judgment is presented, it is competent to inquire into the jurisdiction of the court. In that case in the Massachusetts Court the inquiry was at large. The first Mrs. Andrews was free to produce, and the Court free to receive, any competent testimony on the subject of domicil; whereas in this case the Constitution of the United States required the Supreme Court of the State of Washington to give full faith and credit to the Kansas judgment; and the Kansas judgment was decisive not only to the point that the marriage relation was thereby dissolved, but was decisive of the issue of fact there tried and determined, that the husband at the time of the proceeding was domiciled in Kansas.

In the case of *Werlein vs. New Orleans*, 177 U. S., 390,

397, in an opinion written by Mr. Justice Peckham, the judgment of the State Court was reversed becaused it failed to give full faith and credit to a prior judgment, used as evidence, in another suit between parties in privity with those who were parties to the former suit.

This case is clearly distinguishable from Andrews vs. Andrews and from any other case of divorce which has been before this Court. If in the case of Thompson vs. Whitman, 18 Wall., the owner of the oyster sloop had appeared before the Justices of the Peace and had litigated the fact upon which their jurisdiction depended, he would have been concluded as to that fact in this and all other Courts.

There is no exception to the rule of res adjudicata when applied to facts upon which the jurisdiction of a court depends. In the case of *Noble vs. Union River Logging Railroad,* 147 U. S., 165, 173, it was said: "There is another class of facts which are termed quasi jurisdictional, with respect of which facts the finding of the Court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties." Examples are then given; the Court concluding as follows: "And even if the Court be imposed upon by false testimony, its findings can only be impeached in a proceeding instituted distinctly for that purpose."

In *Volume 12 of the Encyclopedia of Pleading and Practice,* at page 211, will be found the following with a reference to a long list of authorities, to wit:

"Finding of Jurisdictional Facts—When jurisdiction "depends on a fact that is litigated in a suit, and such fact "is found in favor of the party who avers jurisdiction, the "question of jurisdiction is judicially decided and the judg-"ment record is conclusive evidence thereof until set aside "or reversed by a direct proceeding."

This case cannot be distinguished from *Fairchild vs. Fairchild,* 57 N. J. Eq. 678; 51 Am. St. Rep. 650; 34 At. Rep., 10.

In that case the wife, a resident of New Jersey, sued her husband in the Court of Chancery there for maintenance. He pleaded that he had obtained a divorce from the plain-

tiff in the State of Kansas. It appeared that the defendant, the husband, had obtained two decrees of divorce in that State, one in the County of Stafford, the other in the County of Hodgeman. In the Stafford County case the wife was never within the jurisdiction of the Court nor was she served with process, nor did she ever receive any notice of its pendency. In the Hodgeman County case the wife *appeared and made defense.* In the maintenance suit, the Chancery Court of New Jersey found that the husband "was not a bona fide resident of the State of Kansas, but that he went there solely for the purpose of instituting divorce proceedings against the respondent; and that neither the decree of divorce made by the District Court of Stafford County nor that made by the District Court of Hodgeman County was a bar to the suit." A decree was entered accordingly.

The Court of Errors and Appeals reversed the decree of the Chancery Court, holding that the Stafford County decree was void, but that the Hodgeman County decree must be sustained, because that court had jurisdiction over the parties, the respondent having voluntarily appeared and made defense to the action; and that the question of the bona fides of appellant's residence in Kansas was one for the exclusive consideration of the Kansas Court; "and "that decision unless procured by fraud, is conclusive not "only in Kansas, but in every other jurisdiction where the "validity of the judgment comes in question." The Court also held that under the Constitution of the United States full faith and credit must be given in New Jersey to the Kansas judgment.

At the oral argument the attention of the Court was further directed to another consideration, to wit: That in this proceeding the Kansas judgment is relied upon as a muniment of title to property; it may have such effect apart from its effect to dissolve the marriage relation. There can be no doubt as to the validity of the judgment in the State of Kansas, or as to its effect in that State upon the property rights of Mrs. Tull. Having appeared in the case, the judgment against Mrs. Tull is valid in personam; if it had directed the payment of money it could have been sued upon in another State. It is difficult to see why its

effect in Kansas upon the property of Tull does not accompany that property into the State of Washington where it was used *afterwards* in the purchase of real property (as distinguished from the purchase of a *contract*, deposited in escrow, giving the *right to purchase* real property).

And although it may be that a State will not permit the marriage status of one of its citizens to be interfered with by the Courts of a foreign state, it is surely not concerned with the property rights of its citizens, nor with their freedom to subject those rights to the determination of a foreign court.

In a divorce case the entire judgment may be received and given due credit as a legal judgment of a legal court, but the State may say that it will not recognize the efficacy of judicial power even when evidenced by a perfectly legal judgment, either to create or dissolve the marriage relation of one of its citizens.

That the questions here involved are of the highest public importance we submit without comment other than a reference to the opinion of Mr. Justice White in the Andrews case, 188 U. S. Divorces are generally followed by a subsequent marriage. If the validity of the new marriage and the wifehood of the wife, and the legitimacy of the children are forever open to collateral attack, and may depend from time to time, and under differing circumstances, upon such parol testimony as may be adduced, similar in character to that of F. M. Tull in this case, there would seem to be some cause for alarm.

We would also respectfully ask the further consideration by the Court of the following paragraph of the recent opinion.

"It is suggested that the invalidity of the judgment for "want of jurisdiction was not put in issue in the pleadings. "It is a sufficient answer that the Supreme Court of the "State treated it as an issue. Hill v. Mendenhall, 21 Wall. "453, relied on by the plaintiff in error, came from the Cir- "cuit Court of the United States, and when a case properly "is brought here from the Circuit Court upon constitu-

"tional grounds the whole case is open. Horner v. United "States, 143 U. S., 570. But it is otherwise when a case "comes, as this does, from a State Court. Osborne v. "Florida, 164 U. S., 650, 656; McLaughlin v. Fowler, 154 "U. S., 663; Murdock v. Memphis, 20 Wall. 590."

And we would respectfully *submit whether the* power and jurisdiction of the Court are not thus unduly restricted. The case of Murdock v. Memphis, 20 Wall. 590, referred to in the opinion, shows that after the act of 1867 was passed, it was contended that when this Court acquired jurisdiction at all through the existence of a Federal question, it acquired jurisdiction over the *whole case,* including questions of local law as well as Federal questions. By a divided Court this contention was overruled. But as we respectfully contend, although the jurisdiction of this Court extends only to a review of the decision of the Federal question, it includes a review of the entire case so far as it affects that question, and of every error of law committed by the State Court whether of legal procedure or otherwise, which has conduced to produce the erroneous result complained of.

In this case the plaintiff in error produced a sister State judgment and prayed that it be given full faith and credit. It was entitled to rely upon the established and still unquestioned local law of the State of Washington as to pleadings and evidence. When the pleadings were made up it was entitled to assume that so far as the foreign judgment was concerned, evidence of the domicil of Tull was unnecessary and inadmissible (although it might be admissible upon other issues. e. g. community property, brief page 24). The lower Court so held, but on appeal, without notice or opportunity to the plaintiff in error to produce testimony to the point, the Supreme Court attacks the foreign judgment upon a question of fact of domicil not put in issue or submitted by the parties for its consideration or determination. The Supreme Court then refuses faith and credit to the judgment, and without remanding the cause for a new trial or giving opportunity to be heard, it gives final judgment of the rights of the parties. Can it be said that under such conditions the sister State judgment has received full faith and credit? Can a State Court, while assuming to recognize and give full faith and

credit to the foreign judgment, deprive the party of all benefit thereby by some false or erroneous ruling of pleading or evidence? And in such case, is this Court powerless to grant relief?

In the case of *Werlein vs. New Orleans*, 177 U. S., supra, the validity and genuineness of the Federal Court judgment was not questioned, but the State trial Court thought it to be immaterial as applied to the issues in that case, and ruled it out of evidence. This error in the course of the trial in the State Court was finally brought here and reviewed. And this Court by Mr. Justice Peckham, said: "Whether full faith and credit have been given the judgment of a Federal Court by the Courts of a State is a Federal question, and that question exists in this case. Upon the merits we have simply to inquire whether the Courts below erred in their decision refusing to admit in evidence the judgment in the Chancery suit above mentioned."

The act of Congress of 1867 reads that a final judgment * * * where any title, right, privilege or immunity is claimed under the Constitution * * * may be re-examined * * * in the Supreme Court of the United States upon a writ of error * * * in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Court of the United States.

We, therefore, with due submission, question whether the case of Hill vs. Mendenhall, 21 Wall., 453, should be held inapplicable here because that case "came from the Circuit Court of the United States."

All of which is respectfully submitted.

W. S. GOODFELLOW,
E. C. HUGHES,
W. W. HINDMAN,
Counsel for Plaintiff in Error.

I certify that the foregoing petition is in my opinion well founded, and also that the same is not made or filed for the purpose of delay.

W. S. GOODFELLOW,
Of Counsel for Petitioner.

APPENDIX.

Supreme Court of the United States

No. 104.—October Term, 1903.

The German Savings and Loan Society, Plaintiff in Error, *vs.* Dora May Dormitzer, William L. Tull and Ernest B. Tull. } In error to the Supreme Court of the State of Washington.

[January 4, 1904.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a writ of error to the Supreme Court of Washington on the ground that full faith and credit has not been given to a decree of divorce rendered in the State of Kansas. (See 23 Wash. 132.) The record is long, but all that is material to the case in this court can be stated in a few words. The defendants in error are the children of one F. M. Tull, and brought a complaint for the purpose, so far as the Savings Society, the plaintiff in error, is concerned, of establishing their right to an undivided share in certain land in Spokane, Washington, to which the Savings Society claims an absolute title. At least that form of relief was held to be open under their complaint. Their claim was made on the ground that the land was community property of their parents and that they inherited an undivided share upon their mother's death. The Savings Society claimed under the foreclosure of a mortgage executed by F. M. Tull. Before the execution of their mortgage and after Tull had applied for a loan his wife died, and probate proceedings were instituted under which Tull purported to purchase his children's interest as a preliminary to making the mortgage. It has been decided that these probate proceedings were void as against a purchaser with notice and that the Savings Society took with notice. These are local matters with which we have no concern. But the Savings Society contended that it had a good title, irrespective of these proceedings. The land was purchased

with the proceeds of Kansas property which seems to have stood in the name of F. M. Tull. Tull procured a divorce in Kansas, and if that divorce was valid his wife's interest in his property was gone. Therefore, it is said, the land in Washington followed the character of the purchase money as his separate property, although before the payment was completed the divorced parties made up their differences and were married to each other a second time.

The Supreme Court of Washington, trying the case *de novo*, found that Tull had changed his domicil from Kansas to Washington before beginning his divorce proceedings, and therefore that the decree was without jurisdiction and void. It further found on evidence satisfactory to itself that, the divorce being out of the way, the property was joint or community property, and that his children had the right they claimed. With this last again we are not concerned, and the only question for us is whether the court could go behind the record of the Kansas case.

There is a motion to dismiss. It is said that the Federal question was not set up in the court below, and that the court put its decision on two distinct grounds, one of which was that the Society was estopped to deny the children's title. The latter ground, it is said, was independent of the Federal question. But the opinion of the court deals expressly with the constitutional rights of the Savings Society, and the Society seems to have insisted on those rights as soon as the divorce was attacked. *Tullock* v. *Mulvane*, 184 U. S. 497, 503, 504. As to the other point, it is at least doubtful whether the court meant to find any estoppel except on the footing that the property was shown to be community property. The motion to dismiss is overruled. See *Johnson* v. *Risk*, 137 U. S. 300, 307.

On the merits, however, the plaintiff in error has no case. It is suggested that the invalidity of the judgment for want of jurisdiction was not put in issue in the pleadings. It is a sufficient answer that the Supreme Court of the State treated it as in issue. *Hill* v. *Mendenhall*, 21 Wall. 453, relied on by the plaintiff in error, came from the Circuit Court of the United States, and when a case properly is brought here from the Circuit Court upon constitutional grounds the whole case is open. *Horner* v. *United States*, 143 U. S. 570. But it is otherwise when a case

comes, as this does, from a State court. *Osborne* v. *Florida* 164 U. S. 650, 656; *McLaughlin* v. *Fowler*, 154 U. S. 663; *Murdock* v. *Memphis*, 20 Wall. 590.

It is too late now to deny the right collaterally to impeach a decree of divorce made in another State, by proof that the Court had no jurisdiction, even when the record purports to show jurisdiction and the appearance of the other party. *Andrews* v. *Andrews*, 188 U. S. 14, 39; *S. C.*, 176 Mass. 92, 93. An attempt was made to avoid the authority of *Andrews* v. *Andrews* by the suggestion that there the respondent in the divorce suit had disappeared before the decree. But a respondent cannot defeat jurisdiction by disappearing. Indeed in strictness only the attorney disappeared, and the respondent simply ceased to defend the suit. The effect given to the statute of Massachusetts in that case depended wholly on contradicting the record of the divorce suit and proving the want of jurisdiction by proving the libellant's want of domicil in the State.

It very well may be that, if the Supreme Court of Washington had undertaken to deny the jurisdiction of the Kansas tribunal without evidence impeaching it, such an evasion of the Constitution would not be upheld. It may be that in fact some circumstances were adverted to by that court which hardly warranted an inference. But it had before it the testimony of the husband, Tull, from which it appeared that before he made the contract for a part of the land in question he had sold out his property and business in Kansas and had gone in search of what he called a new location, and that when he bought this land he decided to locate there. The land, it will be remembered, is in Spokane, Washington. Tull was there when the contract was made, and therefore there was ground for the court to find that at that moment he changed his domicil to Spokane. The contract was made on December 28, 1886, and the libel for divorce in Kansas was not filed until February 25, 1887. There was evidence warranting the finding, and that being so we take the facts as they were found. *Egan* v. *Hart*, 165 U. S. 188.

Decree affirmed.

Mr. Justice McKENNA dissents.

10381

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 404.

THE GERMAN SAVINGS AND LOAN SOCIETY,
PLAINTIFF IN ERROR,

vs.

DORA MAY DORMITZER, WILLIAM L. TULL, AND ERNEST B. TULL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

MOTION TO DISMISS OR AFFIRM.

MOTION.

And now come the defendants in error and move the court to dismiss the writ of error herein or to affirm the judgment and decree, and assign the following reasons:

1. No Federal question is necessarily involved in the judgment of the court below.

2. The question on which jurisdiction is claimed is so frivolous as not to need further argument.

3. If there is a Federal question involved in the judgment, the decision of the court is so clearly right that the writ of error should be dismissed or the decree and judgment affirmed.

4. That questions not Federal, other than the Federal question stated, were decided in said cause adversely to the plaintiffs in error, and were sufficient, notwithstanding the Federal question, to sustain the judgment and decree.

5. That the matter decided was that the ownership of the unincumbered, undivided one-half of the property in controversy was in the defendants in error, independently of the question of full faith and credit given to the judgment and decree of divorce in the Kansas court.

ROBERT A. HOWARD,
Attorney for Defendants in Error.

THE PLEADINGS.

The pleadings in this case are voluminous. They are fully set out, as also are the facts found, in the opinion of the court, found in the Transcript, pp. 305–361. While respectfully requesting the attention of the court to the opinion, I will endeavor, as briefly as possible, to state the issues and the decision of the court in the language of the court.

The first cause of action (Tr., pp. 2–21) alleges that the plaintiffs and Ernest B. Tull are children of *F. M. Tull*, one of the defendants; that in 1888, then being minors, Dora May being ten years old, William B. fourteen, and Ernest five, *P. D. Tull*, a brother of F. M., was appointed guardian; that on March 1, 1889, F. M. Tull delivered to P. D. Tull as said guardian his promissory note for $14,000, due five years after date, interest at 10 per cent., and secured by mortgage upon the property described in the complaint. The mortgage was recorded. On 7th September, 1889, the guardian

released and satisfied the mortgage. The release was without any order of court authorizing it, without knowledge of the probate court, without payment of the debt secured, which is still undischarged; that said release and satisfaction was made in pursuance of a conspiracy between the defendants F. M. Tull, P. D. Tull, and The German Savings and Loan Society, entered into some time in 1888, with the fraudulent intent, among others, to cheat and defraud the plaintiffs and their brother; that July 18, 1888, plaintiffs and defendant Ernest Tull were the owners in fee-simple of the property described in the mortgage, and that P. D. Tull and F. M. Tull then and there conspired together for the purpose of cheating plaintiffs and their brother Ernest out of the said real estate, procuring the appointment of said P. D. Tull as guardian, and by filing petition in the probate court of Spokane county, falsely alleging it would be beneficial to plaintiffs and their brother to sell their interest in the real estate. The probate court ordered the property sold for cash, and the guardian did sell the same to F. M. Tull and reported the same to the court, which approved the sale November 27, 1888, and the guardian executed the deed therefor, recorded December 1, 1888.

The bill alleges that said sale was not made for cash or for any consideration passing at that time or at the time said deed was executed; that all the proceedings were brought about by F. M. Tull and P. D. Tull to secure to F. M. Tull the whole estate and undivided title and interest in the real estate and for the purpose of cheating and defrauding plaintiffs and Ernest B. Tull; that the purchase price, $14,000, was grossly inadequate, and that at the date of the transaction the interest of plaintiffs and their brother was worth $35,000 and upwards. Twenty days afterwards F. M. Tull mortgaged this real estate to the German Savings and Loan Society to secure his note of $40,000; that this mortgage had been negotiated and its terms and conditions agreed and de-

termined upon by the parties previous to the said guardian's proceedings; that previous to the petition for the sale by the guardian the German Savings and Loan Society knew the condition of the property and all about the title to the same; that the guardianship proceedings were arranged, conceived, and all details settled and agreed upon by F. M. Tull and P. D. Tull and the German Savings and Loan Society, by their several attorneys, and that these attorneys drew up and presented them in the probate court; that the German Savings and Loan Society all the time knew that plaintiffs' and their brother's property was worth $35,000 and upwards, and that the decree authorizing the sale was a subterfuge arranged by F. M. Tull for his own benefit; that when guardian's sale was reported to have been made for cash, said society knew the report was false, and that the sale was not for cash nor anything of value; that the report was false and for the fraudulent purpose of allowing F. M. Tull to mortgage said real estate to the savings and loan society for $40,000; that on March 7, 1889, the guardian reported to the probate court that he had invested proceeds of the sale in notes of F. M. Tull, secured by mortgage (this is note and mortgage first herein mentioned); that this report was fraud upon court and plaintiffs, because it was not stated this was second mortgage to the first mortgage of the loan society. On November 5, 1889, the German Savings and Loan Society released the $40,000 mortgage. On October 26, 1889, F. M. Tull gave to the savings and loan society a mortgage on same property to secure note for $50,000. On May 13, 1892, this last mortgage was released. On May 6, 1892, F. M. Tull mortgaged the same property to the German Savings and Loan Society to secure note for $100,000. This mortgage was foreclosed, and by virtue of a deed executed in pursuance of these foreclosure proceedings the German Savings and Loan Society claimed to be the owner of this real estate. The guardian made no reports or entered any account after December 10, 1889. In his petition for guardianship P. D. Tull alleged that this

property, describing it, was mortgaged for $20,000, which was false, and the German Savings and Loan Society knew it; that the property was fraudulently sold to the society; that after the order of sale no further report was made by the guardian; that at the time of the sale by the guardian to F. M. Tull no appraisers were appointed to appraise the same; no guardian *ad litem* was appointed; there was no bidder but F. M. Tull, and the German Society knew all these facts; that the guardian's bond is invalid, the sureties are insolvent, and P. D. Tull is unable to respond in damages for said notes and interest; that the bond required of a guardian when selling ward's real estate filed by P. D. Tull was canceled and discharged immediately after sale, and the sureties are insolvent. Dora May Tull was married to Dormitzer February 20, 1894. Ernest Tull is a minor, residing with his father, F. M. Tull. Plaintiffs had no knowledge or information of the fraud until just before commencement of suit.

The second cause of action is substantially the same, except that it relates to a note of $34,000, secured by mortgage upon the same property above described and other property, which note included the $14,000 above mentioned and $20,000, which was secured upon all the property described in the complaint (Tr., p. 308).

The prayers for relief (stated Tr., p. 309) are: That the release of the $14,000 mortgage be set aside and declared a fraud upon plaintiffs; that they have personal judgment for $14,000 and interest; that the mortgaged premises be sold and the proceeds applied in payment of the amount found due plaintiffs; that the defendants and all persons claiming under them subsequent to the mortgage be barred and foreclosed from all right, title, &c., in said mortgaged premises, &c.; that the German Savings Company mortgage be declared subsequent to plaintiffs' mortgage; that they have execution for any deficiency after sale; that they may be-

come purchasers *and for general relief.* (See Tr., p. 309 and pp. 339–341.)

The answer of the German Savings and Loan Society puts in issue all the material allegations of the complaint, including the claim of ownership in fee of the undivided one-half of the real estate, and fraud and conspiracy of the defendants, the Tulls and the corporation, and any knowledge or information of such fraud, &c.

The defendant then goes on and states what it claims to be the conditions of the loans to F. M. Tull; that it made several loans—first, $40,000, afterwards paid from insurance money; then $50,000 and $25,000, taken up by a loan of $100,000 made about May 5, 1902. Then a further loan of $20,000, May, 1893. These loans were secured by the mortgages, as stated in the complaint. The defendant goes on to state that they required Tull to disclose the truth as to his title and to furnish a correct abstract, and that, these things having been satisfactorily done, they made the loans and took the security, and that they had no knowledge or means of knowledge as to the title other than the public records, and that they learned from them, and relied upon this, that the mortgages had been released and discharged (Tr., p. 310).

The defendant then at great length (Tr., p. 311) sets out certain circumstances connected with the divorce of F. M. Tull from his wife, the mother of these minors, the complainants, and Ernest B. From there it is supposed the Federal question arises, brought to the attention of this court. It is alleged that F. M. Tull and Lucy A. were married in March, 1870, and continuously until May 20, 1887, were residents, householders, and inhabitants of the State of Kansas. On February 25, 1887, F. M. Tull filed his complaint for divorce in Kingman county, Kansas, for a divorce on the ground of adultery committed by Lucy A. The defendant recites the statutes of Kansas (Tr., p. 311) as to service of summons, and upon a person, "being a resident

of the State, departing therefrom to avoid the service of a summons," and providing for service by publication and personal service by the sheriff of the county in which service is to be made, proved by the affidavit of the person making the service. The answer alleges that personal service was had upon Lucy A. in the State of California, and that on May 20, 1887, the Kansas court decreed the divorce. The answer also alleges that while F. M. Tull was a resident of Kansas he accumulated property to the value of $35,000, and owned and possessed the same May 20, 1887. It recites certain statutes of the State of Kansas (Tr., p. 112) under the title of "Divorce and alimony," which were in evidence (Tr., pp. 44, 200), from which it appears that if a decree for divorce shall arise by reason of the fault or aggression of the wife she shall be barred of all right of dower in the lands of which her husband shall be seized at the time of the filing of the petition for divorce, or which he may thereafter acquire, whether there be issue or not, and the court shall order restoration to her of the whole of her lands, tenements, or hereditaments not previously disposed of, and also such share in her husband's real or personal property or both as to such court may appear just and reasonable. Other provisions of the Kansas laws were cited, as to the interest of a wife in her husband's property after his death (Tr., pp. 46, 312). The answer then alleges that the said Lucy A., her heirs, administrators, or legal representatives, had no other right or interest to the property of F. M. Tull than that given by these s atutes, which interest, if at all, in the realty, became vested only in the event of F. M.'s death; that on the dissolution of the marriage and her death the interest of the said Lucy A., her heirs, administrators, assigns, or representatives, in the property of F. M. Tull, ceased to exist under the laws of Kansas, and that F. M. Tull became and remained the owner of the said property, free from any interest, absolute or contingent, present or remote, of his former wife, her heirs, &c. The answer alleges the conversion into

money, after the divorce, by F. M. Tull of his property, real and personal, the purchase of the property with the money brought by him and acquired by him in Kansas, and obtaining deeds June 17, 1887, and August 19, 1887, and the remarriage of F. M. Tull and Lucy A. Tull August 13, 1887, and her death July 18, 1888. It is alleged that Lucy A. never had any interest in the property described in the complaint; that the guardian's sales of the undivided one-half of the portion of said property for $14,000 and the portion for $20,000 were made by mutual mistake of the said F. M. and P. D. Tull, and under the mistaken belief that Lucy A. was in her lifetime the owner of the undivided one-half interest as the community property of F. M. and Lucy A. as husband and wife; that no interest passed to the said plaintiffs or the said Ernest B. by reason of the death of the said Lucy A., and that the sole consideration for the notes for $14,000 and $34,000 was the supposed interest of the said plaintiffs and Ernest B.; that the money loaned by the corporation to F. M. Tull was loaned with the understanding that the same was to be used in making permanent improvements and removing sundry liens; that F. M. Tull, before foreclosure, was and is now insolvent, and that the property is scant security for the mortgage debt. The answer further alleges that on December 10, 1894, F. M. Tull began an action in Spokane county superior court against P. D. Tull, as guardian of Dora May Dormitzer, Ernest B. and William L. Tull, and upon the same allegations herein pleaded the court made a restraining order enjoining the said P. D. Tull from selling, disposing, &c., or contracting concerning the promissory note above mentioned, for $34,000, which restraining order still remains unvacated and said action still pending.

The cross-complaint and answer of the guardian *ad litem* for Ernest B. is identical with the plaintiffs' complaint except as to the relief. The plaintiffs pray for the foreclosure of the two mortgages. The guardian *ad litem* prays (Tr., p.

314) that all proceedings had in the matter of the estate of William L. Tull as against this defendant be declared void; that this defendant, Ernest B., be declared to be the legal owner of an undivided one-third of one-half of the real estate mentioned in the cross-complaint, and that the deeds and mortgages held by the German Savings and Loan Society, as against this defendant, be canceled, and that said defendant deliver to Ernest B. a deed to an undivided one-third of one-half of said real estate; and in case this cannot be done, this defendant prays for foreclosure of the mortgages. The German Savings and Loan Society made the same answer as to plaintiffs' complaint. To these answers and defenses plaintiffs and the guardian *ad litem* file replications (Tr., pp. 60 to 64 and pp. 314 to 318).

The reply admitted nearly all the material allegations of the first affirmative defense, including the allegations that F. M. Tull and Lucy A. Tull were intermarried on March 3, 1870, and resided in Kansas up to and prior to May 20, 1887, and that F. M. purchased the property in question, and that he, prior to the foreclosure of the mortgages, became and continues insolvent.

By way of second reply to said first affirmative defense, it was alleged that the abstracts of title relied upon by the loan society were imperfect and defective, failing to show that the guardian gave the requisite security as guardian, and that said guardian never gave the bond required by the laws of Washington; that P. D. Tull filed in the probate court a paper purporting to be his bond as guardian for $9,600; that the sureties were F. M. Tull, defendant herein, and one McCamant; that the latter has not been a resident of the State of Washington for more than six years; that he is insolvent and has no property of any kind in said State, and that F. M. Tull, since July 23, 1888, has been and is now insolvent; that said bond did not in many respects meet the requirements of the laws of Washington; that said abstracts of title do not show that the guardian, after each

of the sales of real estate to F. M. Tull, complied with the laws of the State, and that neither the proceeds of said sales, nor the notes, nor the obligation, nor other security taken to secure the purchase-money at such sales were produced before the probate court, nor was there any report thereof made by said guardian; that the court confirmed said sales without compliance with the laws relating to guardianship property.

By way of reply to the second affirmative defense of the loan society, it is pleaded that the divorce was procured by fraud practiced upon Lucy A. Tull; that no process was served upon her in said action; that about May 1, 1887, F. M. and Lucy A. Tull left the State of Kansas and never thereafter resided in said State; that when she was boarding the train some one handed Lucy A. certain papers, and that F. M. Tull, before his wife could examine the same, took said papers from her, saying that he knew what they were; that Lucy A. never knew until two months after that that said papers were the complaint in said action for divorce; that she thereupon commenced an action against the husband in Washington Territory to recover from him an undivided one-half interest in the property in question, alleging that the same was the community property of herself and F. M. Tull, and asking that she be declared to be the owner of one-half thereof, and that said decree of divorce had been obtained by fraud; that soon after said action was commenced the parties thereto came to a settlement upon the following terms: 1st, that they should remarry; 2d, F. M. Tull should acknowledge the claims made by the wife to the property in question, to wit, that the property was community property; 3d, that the divorce in Kansas should be declared null and void; that the action was dismissed, the parties were remarried, and the property thereafter enjoyed by said parties as community property.

For a further reply to the answer of the defendant, it was pleaded that on October 18, 1894, P. D. Tull, as guardian,

was ordered by the superior court of Spokane county to show cause why he did not report his acts and doings as guardian. Said order was made at the instance of plaintiff, Dora May Dormitzer, and her husband. That said F. M. and P. D. Tull thereupon offered to settle and compromise their obligations for a small percentage of the amount due said plaintiffs and their brother, which offer was rejected, and thereupon the said Tulls, by duress and threats, sought to compel plaintiffs and their brother to accept said settlement, informing them that if they did not accept such offer he would see to it that they should get nothing out of the estate left by their mother; that on December 10, 1894, F. M. Tull commenced an action in the superior court to declare the property in question to be his separate property, and that the guardianship proceedings were a mistake; that the claims made by said Tull in said action are false and fraudulent and were concocted by him to compel the plaintiffs and their brother to accept said offer of compromise; that up to the time of the death of Lucy A. the husband had admitted the property in question to belong one-half to her, and after her death had admitted that said one-half belonged to plaintiffs and their brother, and that the loan society knew of such facts. It is alleged, as a further reply, that the defense stated in the answer of the loan society did not accrue within two years before the filing of said answer, and the replication further denies all the material allegations in the answer of the loan society.

On September 14, 1898, by leave of the court, plaintiffs and the guardian *ad litem* filed further replies, the first of which denies all the allegations of the first affirmative answer of the loan society, except the allegation in regard to the giving of different mortgages mentioned therein to the loan society and the foreclosure of the mortgages for $100,000 and for $20,000, and that the loan society became the purchaser and is now in possession thereof. And for reply to the second affirmative answer set forth by the loan

society, they admit the marriage of Lucy A. and F. M. Tull March 3, 1870, but allege that they remained husband and wife until the death of Lucy A. Tull, and deny having any knowledge sufficient to form a belief as to any and all of the allegations in second paragraph of said amended answer and down to and including the thirty-second paragraph thereof, and therefore deny the same. And for further reply to said second amended answer, admit that Tull converted his property in Kansas into money and removed with it to Washington in January, 1887; admit conveyance by Glover on June 17, 1887, of part of the property described in the complaint and on August 19, 1887, of the balance of it; that the contract for the purchase of said last-mentioned portion was made on December 28, 1886, and deny each and every other allegation in paragraph 3 of said answer; deny sufficient knowledge to form a belief as to whether or not a divorce was granted between Lucy A. and F. M. Tull on May 20, 1887, or at any other time, or at all, but, on the contrary, allege that said Lucy A. and F. M. Tull were and remained husband and wife from the time of their marriage until the death of said Lucy A.; deny each and every allegation in paragraphs 5 and 6 of said second affirmative answer and defense; deny knowledge sufficient to form a belief as to matters alleged in paragraphs 7 and 8; admit the commencement of the action by Tull on December 10, 1894, but deny knowledge as to whether the allegations are true.

For further reply, it is alleged that this suit of F. M. Tull *vs.* Dora May Dormitzer *et al.* has, by order of the court, been dismissed.

FINDINGS OF FACT.

The supreme court of Washington, sitting as a court of chancery, made elaborate findings of fact in this case (Tr., p. 318). Many of these facts are admitted in the pleadings and need not be repeated here. After reciting the marriage, it is found that at that time the husband had about $100 in property, the wife none, and that afterwards the wife accumulated $1,300 in Missouri, when the parties removed to Kansas, and remained there until December, 1886, or January, 1887. In the fall of 1886 F. M. Tull settled his affairs in Kansas aud had about $25,000. This property was accumulated by him in business. In December, 1886, he contracted to purchase the property in controversy, which was deeded to him in June and August, 1887. In May or June, 1887, he commenced to build business houses on the property, part of which he afterwards occupied, and afterwards was making other improvements, when his wife died intestate, July 18, 1888, leaving minor children, the complainants and Ernest B. Tull, who are the defendants in error here. The money from the Kansas property and the wife's money from the Missouri property and the earnings of the husband in Washington were applied to purchasing this property and carrying on the Washington business. The court found that this property, the property in controversy, was the community property of F. M. Tull and wife at the time of her death (Tr., pp. 349, 360). The court also found that when Lucy A. died the plaintiffs in error refused to go on with the loan until the interest of the children was transferred to the father; that F. M. Tull and the German Savings and Loan Society dealt with this property as a whole on the basis that the children had one-half interest therein; that F. M. Tull and Lucy A. Tull had agreed as to the status of the property before her death, and this status was recognized by the society (Tr., p. 360).

The court found at great length the facts connected with the divorce proceedings in the State of Kansas (Tr., pp. 343–349) and, examining into the jurisdictional facts, found that there was no service upon the defendant, as required by the laws of Kansas, and concluded (Tr., p. 349) that the Kansas court had no jurisdiction to enter the decree of divorce pleaded, and that such decree is fraudulent and void and no bar to the property rights of the wife. In this connection, the court also found, as facts subsequent to the divorce, that in July, 1887, the wife came with her children to Spokane Falls and immediately commenced a suit there praying that the decree of divorce be set aside as fraudulent and she decreed to be the owner of one-half of the property, being the property in controversy here. She set out at great length the improper and adulterous connection of F. M. Tull with a servant girl in Kansas and at other places where he had gone after he had, as found by the supreme court of Washington, abandoned his residence in Kansas. Two days after the service of summons in this suit the husband and wife signed a stipulation dismissing the action, and it is found by the court that they agreed to a settlement of their difficulties, and, as stated by F. M. Tull himself, they agreed to remarry, that she withdraw the suit, and that they should have an interest in the property * * * and settle up the business as man and wife, and the property be together; (Tr., pp. 321, 322), and that they then went through the ceremony of remarrying and continued to live together thereafter until her death.

The court found that five days after the death of Mrs. Tull the defendant, P. D. Tull, on his petition, upon which F. M. Tull, the father, endorsed his request, was appointed guardian of the minor children (Tr., p. 322). On September 3, 1888, upon his application, he was directed, as guardian, to sell a portion of the real estate in controversy. He reported that he had sold the same to F. M. Tull for $14,000, that being the highest bid. The first loan of $40,000 by

the loan society was made after these proceedings in the probate court, although it had been applied for on May 8, 1888, before the death of the wife. The guardian reported that he had received this sum of $14,000 in the note of F. M. Tull for $14,000 due five years after date. In 1889 the buildings burned and the $40,000 was paid out of the insurance. The subsequent loans upon this property were made for the amounts and with the securities as stated in the pleadings, one for $100,000 and the other for $20,000, and foreclosed and a sale made under the decree, and the loan society became the purchaser (Tr., p. 326).

The court then at great length sets out the facts connected with the probate proceedings and the acts of the guardian, P. D. Tull, and the father, F. M. Tull, in transferring the property from the minor children to F. M. Tull; and whether those acts were fraudulent; and whether the loan society, plaintiff in error, took these mortgages upon the property in good faith, without knowing or having the means of information by which it might have known the character of the acts of the guardian and F. M. Tull. The court found that the loan society was not a purchaser in good faith; but conceding that it did not have actual knowledge that the probate proceedings were for the purposes shown in this case, it had actual knowledge of circumstances to put it upon inquiry as to F. M. Tull's title to the children's one-half of the property, and by the exercise of reasonable diligence could have obtained knowledge of all circumstances under which the order of sale of the probate court was made and the title transferred (Tr., p. 357).

The court also found that the probate proceedings were for the purpose of vesting the title to the entire property in the father, so that he might mortgage it to the loan society in order to get money to go on with the buildings in course of construction on part of the property, and that in place of the children's interest being sold for cash, they were to get a mortgage *second and subordinate* to that of the loan society,

for a sum the father was to go through the form of bidding, which had been agreed upon in advance by the probate court; that the guardian did just as he was directed to do by the father, with full knowledge of the probate court, and that no *bona fide* sale in the open market to the highest bidder was contemplated.

ASSIGNMENT OF ERRORS.

The supreme court of the State of Washington erred in that full faith and credit should have been given by the courts of the State of Washington to a certain judgment or decree of divorce rendered in and by the district court of Kingman county, State of Kansas, a court of record and general jurisdiction, on the 20th day of May, 1887, upon the complaint of the plaintiff, personal service upon and answer by defendant, in a certain case wherein F. M. Tull was plaintiff and Lucy A. Tull was defendant, which judgment was specially set up and pleaded as a bar to the maintenance of this action, and in fact in the judgment and decree of the supreme court of the State of Washington in this action full faith and credit, as required by section 1, article IV, of the Constitution of the United States and the laws of Congress, was not given to said decree of divorce, which Federal question was necessary to be and was passed upon by the supreme court of the State of Washington in the final determination of said cause, the decision rendered by the supreme court of the State of Washington being against said claim so specially set up and claimed by the petitioner, The German Savings and Loan Society.

2. The supreme court of the State of Washington erred in holding that the defendant, Lucy A. Tull, in said divorce proceeding was not served with process in said cause.

3. In holding that the answer filed by and in behalf of the defendant, Lucy A. Tull, and the defense in said action by her attorney of record, one J. W. Hughes, was fraudulent and unauthorized.

4. The said supreme court erred in holding that at the time of the commencement of said action for divorce and of the rendition of the decree therein the plaintiff, F. M. Tull, was not a resident of the State of Kansas, within the meaning of the laws of said last-named State.

5. The said supreme court erred in holding that said decree of divorce was obtained by the fraud of the plaintiff, F. M. Tull.

6. The said supreme court erred in holding that the decree of divorce rendered by a court of competent jurisdiction in a sister State, upon personal service and answer and defense, interposed by her, through an attorney of record, can be collaterally assailed on the grounds of fraud, in the courts of the State of Washington, by the heirs of the defendant.

7. The said supreme court erred in holding that a complaint filed by the defendant, Lucy A. Tull, in the district court of Washington Territory, in an action begun by her against F. M. Tull in July following the rendition of said decree of divorce, was admissible in evidence in a collateral proceeding by her heirs as part of the *res gestæ* to establish the alleged fraud in the procuring of said decree of divorce.

8. The said supreme court erred in holding in this action that the district court of the State of Kansas, in said divorce proceeding, had no jurisdiction of the parties or subject-matter therein.

9. The said supreme court erred in holding that the plaintiff in the said divorce proceeding could lose and had lost his long-time residence in the State of Kansas without acquiring a residence elsewhere, and that the district court of the State of Kansas, in that proceeding, was therefore without jurisdiction of the parties to such an extent as to be open to attack by the heirs of one of the parties in this action.

10. The said supreme court erred in that the decision rendered lacks the concurrence of a majority of the said court as constituted at the time of the hearing of said cause and its submission to said supreme court for its determination; wherefore the said decision was null and void and in violation of article V of the amendments to the Constitution of the United States, which provides that no person shall be deprived of life, liberty, or property without due process of law.

11. The said supreme court erred in that its said decision and decree is entirely aside and outside of the issues raised by the pleadings and record in this cause, and is therefore null and void, in that it in effect takes the property of the German Savings and Loan Society without due process of law, in violation of article V of the amendments to the Constitution of the United States; all of which errors appear in the record and proceedings in this cause.

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ARGUMENT.

This case is reported in 23 Wash., 132.

The tenth and eleventh assignments of error are the only ones which do not refer to matters involved in the consideration of the divorce proceeding had in Kansas. The tenth is that the supreme court of Washington erred, in that the decision rendered lacks the concurrence of a majority of the said court, as constituted at the time of the hearing of said cause and its submission to said supreme court for its determination. Wherefore the said decision was null and void and in violation of article V of the amendments to the Constitution of the United States, which provides that no person shall be deprived of life, liberty, or property without due process of law.

It is difficult to see what is meant by this objection. There is nothing in the record to support it. The supreme court of Washington, sitting in regular term, with five judges on the bench, entertained the appeal, heard arguments, decided the case, and it is reported in the 23d volume of the State reports.

Dormitzer vs. German Savings & Loan Society, 23 Wash., 132; see p. III, *ib.*

No objection or suggestion of matter of this kind is shown anywhere.

The eleventh assignment is equally frivolous. The supreme court of Washington carefully stated the issues as made by the plaintiffs and defendants, and decided them. There is no possible question of due process of law.

The other nine assignments of error are confined to matters connected with the divorce proceedings had in the Kansas court, and it is claimed, and as the Federal question in this case, that full faith and credit was not given to the judgment and decree in that case. It is true that the su-

preme court of Washington entered into an inquiry into the jurisdiction of the Kansas court, and that the court declared that Lucy A. Tull, the defendant in the divorce proceedings, had not been served with process in that cause; that the pretended defense was fraudulent; that the plaintiff, F. M. Tull, was not a resident of the State at the time of the commencement of the suit; that the divorce was obtained by his fraud; that the Kansas court had no jurisdiction to enter the decree of divorce, and that such decree was null and void.

But in this case there are other questions which were considered and determined, and which are not alluded to in the assignment of errors. They are in the record, however. It is urged upon the part of the defendants in error, who make this motion, that the cause was decided upon grounds which involved no Federal question and which were broad enough to support the judgment, notwithstanding the Federal question of full faith and credit to be given to the judgment of another State.

The State court, as one of the grounds for its judgment, decided that this property in controversy is presumed to have been the community property of F. M. Tull and his wife at the time of her death.

Certain statutes of Kansas relating to property rights are pleaded by the respondent (plaintiff in error). Referring to this matter, the court said (Tr., p. 349): "The only proof offered as to the laws of Kansas is not as to the status of property during the continuance or existence of the community; but as to the effect of a dissolution by death or divorce. In the absence of proof of the laws of another State in relation to the property rights of husband and wife as to property acquired there during marriage, it has been held that they will be presumed to be the same as those of the States where the proceeds of such property have been re-invested (*Marsteen vs. Lash*, 61 Cal., 622; *Shumway vs. Leakay*, 67 Cal., 438; *Mortimer vs. Marder*, 93 Cal., 172). This

court has held that under the statutes of this State lands acquired after marriage by a deed of purchase expressing a money consideration are presumed to be community property, and the presumption can be rebutted only by clear and convincing proof that the consideration was furnished out of the grantee's separate property (*Yesler vs. Hochstetler*, 4 Wash., 349). From the view we take of this case, it is not necessary to further discuss the question of presumptions" (Tr., pp. 349, 350; 23 Wash., 206). And further (Tr., p. 360): "We have already decided that the property in controversy is presumed to have been the community property of F. M. Tull and wife at her death."

The decree of the Kansas court was a decree simply dissolving the bonds of matrimony—nothing else.

Another of these grounds, and what the State court held as decisive of this case, is summed up by the court thus: "Whether the respondent (the plaintiff in error) took its mortgages upon the property in controversy in good faith, without knowing or having the means of information by which it might, by the exercise of common prudence, have known of the acts of the guardian and F. M. Tull in transferring the property from the minor children of F. M. Tull, and whether these acts were fraudulent" (Tr., p. 350; 23 Wash., 207). The court held that the respondent (plaintiff in error) was not a purchaser in good faith, and that it had sufficient knowledge to put it upon inquiry, which would have shown the fraudulent character of the mortgagor's title, and was of opinion the mortgagee (the plaintiff in error) was estopped from disputing the title of the minor children. The court say: "When Lucy A. Tull died respondent refused to go on with the loan until the interest of the children was transferred to the father, F. M. Tull, and the respondent (plaintiff in error) dealt with this property as a whole on the basis that the children had one-half interest therein. F. M. Tull and Lucy A. Tull had agreed as to the

status of the property before her death, and this status was recognized by the respondent" (Tr., p. 360).

The decision of the court was: "This cause is remanded to the court below, with instructions to enter a judgment and decree herein adjudging and decreeing that Dora May Dormitzer, William L. Tull and Ernest B. Tull, the appellants herein, are entitled to an unincumbered, undivided one-half of the real estate described in the pleadings in this action, and that the guardian deeds described in said pleadings and orders of the probate court of Spokane county, directing the sale of said half interest, or in any way affecting the same, and the said guardian deeds conveying the same to F. M. Tull by P. D. Tull, as guardian of said appellants, as set out in the pleadings, be declared null and void; and also decreeing that the plaintiffs in the action below recover their costs" (Tr., p. 361; 23 Wash., 224).

The supreme court of Washington then rested its judgment and decree upon these grounds:

I. That at the time of the death of Lucy A. Tull the property in controversy is presumed to have been the community property of her and F. M. Tull, her husband, and that her right, title, and interest therein descended to her children.

II. That the probate proceedings, including the appointment of the guardian, the sales of the property, and execution of the deeds from the guardian to the father, were fraudulent and void.

III. That the mortgages of the property by the guardian and afterwards by the father to the plaintiff in error were in fraud of the rights of the minors and void, and that the plaintiff in error was not a purchaser in good faith at the sales of said property.

IV. That the plaintiff in error is estopped from denying the title of the minors to the property in controversy.

Of these questions the court in Washington had undoubted jurisdiction. Their decision is broad enough to sustain the judgment and decree, without reference to the Federal question raised by the plaintiff in error.

We submit that the case comes fully within the principles so clearly expressed in *Eustis vs. Boles*, 130 U. S., 361, and so frequently and emphatically affirmed by this court.

N. Y. & N. E. Railroad Co. vs. Woodruff, 153 U. S., 689.
Gillis vs. Stinchfield, 159 U. S., 658.
Mo. Pacific R'y Co. vs. Fitzgerald, 160 U. S., 556.
Harrison vs. Morton, 171 U. S., 38.
Hale vs. Lewis, 181 U. S., 473.
Rutland R. Co. vs. Cent. Vermont Co., 159 U. S., 630.

It is further respectfully submitted that if the Federal question raised by the plaintiff in error is considered, the decision of the Washington court was so clearly right that its judgment and decree should be affirmed.

Thompson vs. Whitman, 18 Wall., 457.
Andrews vs. Andrews, Oct. T., 1902, U. S. Sup. Ct.
Bell vs. Bell, 181 U. S., 175.
Streitwolf vs. Streitwolf, *ib.*, 179.

ROBERT A. HOWARD,
Counsel for Defendants in Error.

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—IN THE—

Supreme Court of the United States

ON WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

THE GERMAN SAVINGS AND LOAN SOCIETY,
Plaintiff in Error,

vs.

DORA MAY DORMITZER, WILLIAM L. TULL, AND ERNEST B. TULL,
Defendants in Error.

No. 404
October Term,
1902.

Brief of Ernest B. Tull, a Minor, on Motion to Dismiss or Affirm.

WM. M. MURRAY,
Guardian *ad litem* for Ernest B. Tull,
a minor, *in propria persona.*

FREDERICK W. DEWART, Of Counsel.
Spokane, Wash.

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Brief of Ernest B. Tull, a Minor, on Motion to Dismiss or Affirm.

Motion to Dismiss or Affirm.

Comes now Ernest B. Tull, defendant in error, by his guardian *ad litem*, William M. Murray, and moves the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because no Federal question was set up or claimed in this cause before the Supreme Court of the State of Washington, and also because the decision of the Supreme

Court of the State of Washington was based upon a ground which did not involve a Federal question, and which was broad enough to support the judgment.

And the said defendant in error, also moves the Court to affirm the said judgment or decree from which said writ of error purports to have been taken, because although the record in the said cause may show that this Court has jurisdiction in the premises, yet it is manifest that said writ of error was taken for delay only, is frivolous, and does not need further argument.

WILLIAM M. MURRAY,
Guardian *ad litem* of Ernest B. Tull, a minor,
in propria persona.

Statement of Facts.

The facts in the case, in so far as it is necessary for them to be considered on this motion, are as follows:

In 1888, Mrs. Lucy A. Tull died in the city of Spokane, leaving surviving her, her husband, F. M. Tull, and three minor children, Dora May Tull (later Dora May Dormitzer, now Dora May Seeley), aged ten, William L. Tull, aged fourteen, and Ernest B. Tull, aged five. She and her husband owned the real estate described in the pleadings, consisting of about half of a block of ground near the business center of Spokane. The parties understood the property to be community property and treated it as such, in which case one-half of the property, under the laws of the State of Washington,

descended to the three children above named, and the other half belonged to the father, F. M. Tull.

In order to complete the improvements which were being made on this property at the time of her death, it was necessary to make a loan with the property as security, and F. M. Tull applied to the German Savings & Loan Society, the plaintiff in error (hereinafter designated as the Society), for the loan, but the Society refused to take a mortgage from the children or from anyone acting for them. But the attorney for Mr. Tull and the attorney for the Society arranged a plan which was then carried out, as follows:

Probate proceedings were conducted in which F. M. Tull's brother was named as guardian for the children, and filed his bond with F. M. Tull and one other as security. The children's interest in the property was sold under order of the Court and bid in by F. M. Tull, who paid for it with his note to the children's guardian, secured by a second mortgage on the property purchased. The Society was given the first mortgage on the property by F. M. Tull for its loan. The sale to F. M. Tull was reported to the Probate Court as a cash transaction and was confirmed. Later the loans from the Society being increased and new mortgages being given to it, the guardian released the mortgage given by F. M. Tull and marked it on the records as paid and satisfied, although in the entire proceeding not one cent of money had been handled by him.

The interest was paid on the loan for a while, but later F. M. Tull became in default for both principal and interest

on the loan to the Society and in 1896 the Society foreclosed its mortgage by proceedings in the United States Circuit Court and bought in the property at the sale for the amount of the judgment.

In 1897 this suit was begun in the Superior Court of Spokane County, Washington, by the two children, who were now of age, making their infant brother a party defendant, against the Society, setting up the probate and other proceedings, and asking to have the whole declared void and their one-half interest in the property returned to them.

Among the defenses set up by the Society was that in 1886 F. M. Tull had obtained in the State of Kansas a divorce from Lucy A. Tull on the ground of adultery, and that under the laws of the State of Kansas, all the property thereby became his separate property. That about three months later F. M. Tull and Lucy A. Tull remarried in the State of Washington, but the property which he had at the time of his remarriage did not become the community property of himself and wife; that therefore the probate proceedings were useless and unnecessary, as the entire interest in the property was in F. M. Tull before and after the death of his wife.

The plaintiffs and the infant defendant, by his guardian *ad litem*, thereupon claimed that the decree of divorce rendered by the Kansas court was obtained by fraud and was null and void; that F. M. Tull was not a resident of Kansas at the time the suit was instituted; that the defendant Lucy A. Tull had not been served with process in the suit and had no knowl-

edge of it, and that the pretended appearance of Lucy A. Tull by attorney was unauthorized, fraudulent and void. They also claimed that the Society, by its acts theretofore, and by the proceedings had, was now estopped to deny the community character of the property.

The cause was tried by the Superior Court of Spokane County without a jury and decision rendered by the court in favor of the Society. The plaintiffs and minor defendant appealed to the Supreme Court of the State of Washington, in which court the cause was submitted on briefs and without oral argument. Thereafter on November 7, 1900, the Supreme Court rendered its decision in the cause, reversing the judgment of the lower court and remanding the case to that court to enter a decree in accordance with the decision. As is the practice in this State, the Supreme Court did not make formal findings of fact, but did find in the opinion, which is very full, covering 89 pages of the official report (23 Wash., pp. 135 to 224; Record herein pp. 508 to 579), the following facts:

That the decree of divorce was procured by fraud; that F. M. Tull was not a resident of the State of Kansas at the time he filed his suit for divorce against Lucy A. Tull, as is required by the laws of Kansas; that no service, either actual or constructive, in accordance with the laws of the State of Kansas, was had on the defendant Lucy A. Tull in that divorce suit; that the pretended appearance of an attorney for Lucy A. Tull in that divorce suit, and the pretended answer filed by him were unauthorized, without her knowledge and fraudu-

lently procured by the plaintiff, F. M. Tull (Record, pp. 554 to 562). And that the Society was estopped from disputing the title of the children. (Record, pp. 578-579.)

Thereafter the Society filed its petition for rehearing, which is not in the record, but which was denied by the Supreme Court (Record, p. 580), and the cause remanded to the lower court.

The Society having sued out a writ of error to the Supreme Court of the State of Washington, makes eleven assignments of error. (Record, pp. 587-589.)

Assignment 10 is based upon nothing whatever that can be found in the record, and it will not be pretended by plaintiff in error that the claims in specifications 10 and 11 were ever set up or claimed before they were stated in these assignments of error. But, as we will show later, this is not sufficient to give this court jurisdiction, and these assignments will not be considered by this court.

Assignment 6 does not pretend to be based on any Federal question, nor do assignments 2, 3, 4, 5, 7, 8 and 9, which merely allege error in the findings of fact of the state Supreme Court. But this court will not consider on writ of error any but Federal questions, and the findings of fact of the court below are conclusive on this court. We present in the argument below, authorities for both of these statements.

Assignment 1 is the only one which has any pretense of a Federal question, and we believe this does not stand on examination.

Argument.

MOTION TO DISMISS.

1. NO FEDERAL QUESTION WAS SET UP OR CLAIMED IN THE COURT BELOW.

The first ground on which is based our motion to dismiss the writ of error for lack of jurisdiction is that no Federal question was specially set up or claimed in the court below. The pleadings set out in the transcript of the record, which has been printed, fail to show any reference to the Constitution of the United States, either directly or indirectly, and the entire record of the trial proceedings also fails to show any such claim at any time or in any place.

There are certain Federal questions which need not be raised in the lower court, but this is not one of them. This question is one of the third class enumerated in Section 709 Revised Statutes, as was pointed out in the case of *Columbia W. P. Co. v. Columbia E. S. R. L. & P. Co.*, 172 U. S., 475, where the court said:

"To the argument that the Federal right was not 'spe-
"'cially set up and claimed,' in the language of Revised Stat-
"utes, Section 709, it is replied that this is not one of the cases
"in which it is necessary to do so. Under this section there are
"three classes of cases in which the final decree of a state court
"may be re-examined here:

(1) "'Where is drawn in question the validity of a
"'treaty, or statute of, or authority exercised under, the United
"'States, and the decision is against their validity;'

(2) " 'Where is drawn in question the validity of a stat-
" 'ute of, or an authority exercised under, any State on the
" 'ground of their being repugnant to the Constitution, treaties
" 'or laws of the United States, and the decision is in favor
" 'of their validity;'

(3) " 'Or where any title, right, privilege or immunity
" 'is claimed under the Constitution, or any treaty or statute
" 'of, or commission held or authority exercised under, the
" 'United States, and the decision is against the title, right,
" 'privilege or immunity specially set up and claimed by either
" 'party under such Constitution, statute, commission or au-
" 'thority.'

"There is no doubt that under the third class the Federal "right, title, privilege, or immunity must be, with possibly "some rare exceptions, specially set up or claimed, to give this "court jurisdiction. Spies v. Illinois, 123 U. S., 131, 181; "French v. Hopkins, 124 U. S., 524; Chappell v. Bradshaw, "128 U. S., 132; Baldwin v. Kansas, 129 U. S., 52; Leeper v. "Texas, 139 U. S., 462; Oxley Stave Co. v. Butler County, "166 U. S., 648."

In the case of *F. G. Oxley Stave Co. v. Butler County*, 166 U. S., 648, this court went fully into the question of the necessity for the claim to have been "specially set up and "claimed" before the lower court. It was there said:

"But can it be said that the plaintiffs *specially* set up or "claimed the protection of that amendment against the opera-

"tion of that decree by simply averring—without referring to "the Constitution, or even adopting its phraseology—that the "decree was passed against deceased persons, as well as in the "absence of necessary or indispensable parties?

"This question must receive a negative answer, if due "effect be given to the words 'specially set up or claimed' in "Section 709 of the Revised Statutes. These words were in "the twenty-fifth section of the Judiciary Act of 1789 (1 Stat. "85), and were inserted in order that the revisory power of "this court should not extend to rights denied by the final judg- "ment of the highest court of a State, unless the party claiming "such rights plainly and distinctly indicated, before the state "court disposed of the case, that they were claimed under the "Constitution, treaties, or statutes of the United States. The "words 'specially set up or claimed' imply that if a party in- "tends to invoke for the protection of his rights the Constitu- "tion of the United States, or some treaty, statute, commission, "or authority of the United States, he must so declare; and, "unless he does so declare 'specially,' that is, unmistakably, this "court is without authority to re-examine the final judgment "of the state court. This statutory requirement is not met if "such declaration is so general in its character that the purpose "of the party to assert a Federal right is left to mere inference. "* * * Upon like grounds the jurisdiction of this court "to re-examine the final judgment of a state court cannot arise "from mere inference, but only from averments so distinct and "positive as to place it beyond question that the party bringing

"a case here from such court intended to assert a Federal "right."

And this conclusion has been repeatedly reaffirmed, and we call attention to the following cases where the rule has been laid down which is applicable to this case:

"But when the jurisdiction of this court is invoked for "the protection, against the final judgment of the highest court "of a State, of some title, right, privilege or immunity secured "by the Constitution or laws of the United States, it must ap- "pear expressly or by necessary intendment, from the record, "that such right, title, privilege or immunity was 'specially set "'up or claimed' under such Constitution or laws. Rev. St. "709. Our jurisdiction cannot arise in such case from infer- "ence, but only from averments so distinct and positive as to "place it beyond question that the party bringing the case up "intended to assert a Federal right."

Kipley v. Illinois, 170 U. S., 182.

"If a party to an action in a state court intends to invoke "for the protection of his rights the Constitution of the United "States, or some treaty, statute, commission, or authority of "the United States, he must so declare."

Chapin v. Fye, 179 U. S., 127.

In which case the party clearly raised a Federal question, but inadvertently named the Fifth and Seventh Amendments to the Constitution instead of the Fourteenth Amendment, but this was held insufficient and the writ of error was dismissed.

"The rule is firmly established, and has been frequently "reiterated, that the jurisdiction of this court to re-examine "the final judgment of a state court, under the third division "of section 709, cannot arise from mere inference, but only "from averments so distinct and positive as to place it beyond "question that the party bringing the case here from such court "intended to assert a Federal right. The statutory require- "ment is not met unless the party unmistakably declares that "he invokes, for the protection of his rights, the Constitution, "or some treaty, statute, commission or authority, of the United "States. Applying this rule to the case before us, the writ of "error cannot be maintained."

Michigan Sugar Co. v. Michigan, 185 U. S., 112.

"To give us jurisdiction under section 709 of the Revised "Statutes, because of the denial by a state court of any title, "right, privilege, or immunity claimed under the Constitution, "or any treaty or statute of the United States, it must appear "on the record that such title, right, privilege, or immunity was "'specially set up or claimed' at the proper time in the proper "way. To be reviewable here, the decision must be against the "right so *set up or claimed.*"

Jacobi v. Alabama, (decided Nov. 17, 1902), 23 Sup. Ct. Rep., 48.

In no place in the pleadings in the case in hand and in no place in the proceedings at the trial or on the appeal, is there any reference to the Constitution of the United States or any claim under it. The only color for the idea that such a claim

was made is found in the opinion of Mr. Justice White in the court below (Record, p. 562), where he says:

"But the respondent claims that, inasmuch as the record "shows the appearance of Lucy A. Tull by an attorney in the "divorce suit in Kansas, it cannot now be collaterally ques- "tioned by her heirs in this suit, or the jurisdiction of the court "disputed. This divorce record is plead and introduced in "evidence and effect is sought to be given to it here by virtue "of Section 1, Article IV, Constitution of the United States, "and the laws of Congress, to give full credit to the records "of sister states."

We thus have the unusual condition, for we have been unable to find its parallel in our reports, where the court raises and refers to a constitutional question as if it had been raised by the plaintiff in error, when in fact the plaintiff in error had not at any time raised the question or referred to it in any way. It is doubtful if it could be held to have been decided by the court adversely to the plaintiff in error, for, as was said by Mr. Justice Peckham, speaking for this court:

"A point that was never raised, cannot be said to have "been decided adversely to a party who never set it up or in "any way alluded to it."

Dewey v. Des Moines, 173 U. S., 193.

But we are not concluded by this statement of the judge who wrote the opinion. Whether the Federal claim was properly and sufficiently set up is a question for this court and any statement by the court below or by any of its members does not

bind this court. As was said in the late case of *Erie Railroad Co. v. Purdy*, 185 U. S., 148:

"We state the matter in this way because, as said in Carter "v. Texas, 177 U. S., 442, 447, 'the question whether a right "'or privilege, claimed under the Constitution or laws of the "'United States, was distinctly and sufficiently pleaded and "'brought to the notice of a state court, is itself a Federal "'question, in the decision of which this court, on writ of error, "is not concluded by the view taken by the highest court of the "'State. Neal v. Delaware, 103 U. S., 370, 396, 397; Mitchell "'v. Clark, 110 U. S., 633, 645; Boyd v. Thayer, 143 U. S., "'135, 180.'"

And it has been held that a certificate by the Chief Justice of the Supreme Court of the State is insufficient to give this court jurisdiction, but that such a certificate may be used to make certain and specific what is too general and indefinite in the record.

See *Yazoo & Miss. Railroad Co. v. Adams*, 180 U. S., 41, and cases cited.

It was held in *Zadig v. Baldwin*, 166 U. S., 485, that statements from the briefs filed in the Supreme Court of the State were not proper to show that the Federal question was raised in the lower court, and this has never been overruled. But in New *York Central Railroad Co. v. New York*, 186 U. S., 269, it was said:

"But assuming, without intimating an opinion to that "effect, that the raising of a Federal question in the brief might

"be sufficient, it is well settled in this court that it must be made "to appear that some provision of the Federal, as distinguished "from the state, Constitution was relied upon, and that such "provision must be set forth." And the court looked at the briefs to see if the Federal question was raised in them, and found it was not.

The certificate of the Chief Justice of the Supreme Court of the State of Washington with the briefs attached has been filed in this court by the clerk of that court as a supplemental transcript duly certified. That a supplemental transcript may be sent up by the clerk was held by this court in *Crandall v. Nevada,* (not in official report), Vol. 18, Law Edition U. S. Supreme Court Reports, p. 744.

That in the State of Washington, the briefs are a part of the record in the Supreme Court would seem clear from Section 6513 Ballinger's Annotated Codes and Statutes of Washington, which provides:

"Within four months after an appeal shall have been taken "by notice as provided in this title, the clerk of the superior "court shall prepare and certify and send up to the supreme "court, at the expense of the appellant (except in criminal ap- "peals prosecuted in *forma pauperis,* and in such cases at the "expense of the county), the original briefs on appeal filed and "any original bill of exceptions or statement of facts, and a "copy of so much of the record and files as the appellant shall "deem material to the review of the matters embraced within "the appeal. The papers and copies so sent up, together with

"any thereafter sent up as hereinbelow provided, shall consti-
"tute the record on the appeal."

So that there is now before this court, as is stated in the certificate of the Chief Justice, all the records and all the arguments which were before the court below, and this court can see for itself what questions were raised and how they were raised.

We have gone carefully through all the record and the briefs and have been unable to find the slightest reference to the Constitution of the United States or any claim thereunder, and nothing whatever to indicate that "the party bringing a "case here from such court intended to assert a Federal right." Indeed an examination of the brief filed by the Society in that court shows that there was not only no Federal right asserted but no thought of a Federal question of any kind in connection with the case.

It is very evident that no Federal question at all was set up or claimed in the court below, and that the statement by the Judge in the opinion is a mistake. He saw that such a Federal question could have been raised, and when he wrote the opinion forgot that it was not raised by any of the parties.

It will not be necessary for this court to go all through the lengthy record and briefs to decide if or where a Federal question was raised, for if a Federal question was raised, the plaintiff in error in his brief on this motion will point out to the court the specific pages in the record where this was done,

and failing to do this, must concede the correctness of our statement.

But if the record does not show that the Federal question was raised, but the record shows that the Federal question was not raised, we submit that under *Erie Railroad Co. v. Purdy*, supra, this court will say that the Federal question was not set up or claimed before the court below and therefore that the writ of error must be dismissed.

2. THE COURT BELOW DECIDED THE CASE UPON AN INDEPENDENT NON-FEDERAL GROUND, BROAD ENOUGH TO SUPPORT THE JUDGMENT.

In the pleadings in this cause, the Society set up the decree of divorce rendered by the Kansas court, claiming thereby that the property in question was the separate property of F. M. Tull and not the community property of himself and wife. The children claimed, however, not only that the judgment was void, but also, that the Society by its acts was estopped to set up the claim that the property was not community property. And this claim was sustained by the Supreme Court of the State. The opinion says:

"We have already decided that the property in controversy "is presumed to have been the community property of F. M. "Tull and wife at the time of her death. If this presumption "did not control, we think that the respondent is estopped from "disputing the title of these children. When Lucy A. Tull died

"respondent refused to go on with the loan until the interest "of the children was transferred to the father. F. M. Tull and "the respondent dealt with this property as a whole on the basis "that the children had one-half interest therein. F. M. Tull "and Lucy A. Tull had agreed as to the status of the property "before her death, and this status was recognized by the re- "spondent; but the presumption that it was community prop- "erty not having been overthrown, it is not necessary to further "comment on the effect and character of this estoppel." (Record, pp. 578-579.)

This court has stated the principle that even if the state court has decided against the plaintiff in error on a Federal question, this court will not look into the Federal question, if the state court has decided against the plaintiff in error on an independent ground sufficient to support the judgment, not involving a Federal question. The principle is clearly stated in *Bacon v. Texas*, 163 U. S., 207, as follows:

"But where there are two grounds for the judgment of the "state court, one only of which involves a Federal question, and "the other is broad enough to maintain the judgment sought "to be reviewed, it is now settled that this court will not look "into the Federal question, inasmuch as there is another ground "upon which the judgment can rest, and it will dismiss the writ "for that reason. Eustis v. Bolles, 150 U. S., 361. In the "course of the opinion in that case, which was delivered by "Mr. Justice Shiras, the case of Beaupre v. Noyes, 138 U. S.

"397, 401, is cited, and the opinion of the latter case contains "the following statement: 'Whether the state court so in- " 'terpreted the territorial statute as to deny such writ to plain- " 'tiffs in error, we need not inquire, for it proceeds in part " 'upon another and distinct ground, not involving a Federal " 'question, and sufficient in itself to maintain the judgment, " 'without reference to that question.' The opinion after stat- "ing what that ground was, thus continues: 'That view does " 'not involve a Federal question. Whether sound or not, we " 'do not inquire. It is broad enough in itself to support the " 'final judgment, without reference to the Federal question.'

'In Rutland Railroad v. Central Vermont Railroad, 159 "U. S., 630, it is stated, 'that where a state court. in rendering " 'judgment, decides a Federal question, and also decides " 'against the plaintiff in error upon an independent ground, " 'not involving a Federal question, and broad enough to sup- " 'port the judgment, this court will dismiss the writ of error " 'without considering the Federal question.' To same effect "are Gillis v. Stinchfield, 159 U. S., 658, 660; and Seneca "Nation of Indians v. Christy, 162 U. S., 283."

And in later cases this principle has been reaffirmed and restated as the following quotations will show:

"The Supreme Court, it is true, passed on other grounds, "passed on the one which it is claimed involved a Federal ques- "tion, and decided it adversely to plaintiff. But the rule in "such cases has been repeatedly declared by this court. It is

"not necessary to review the decisions. That has been done by "Mr. Justice Shiras in Eustis v. Bolles, 150 U. S., 361. It is "sufficient to announce the rule pronounced in that case:

" 'It is settled law that, to give this court jurisdiction of " 'a writ of error to a state court, it must appear affirmatively, " 'not only that a Federal question was presented for decision " 'by the state court, but that its decision was necessary to " 'the determination of the cause, and that it was actually de- " 'cided adversely to the party claiming a right under the Fed- " 'eral laws or Constitution, or that the judgment as rendered " 'could not have been given without deciding it. Murdock v. " 'Memphis, 20 Wall, 590; Cook County v. Calumet & Chi- " 'cago Canal Co., 138 U. S., 635.

" 'It is likewise settled law that where the record discloses " 'that if a question has been raised and decided adversely to a " 'party claiming the benefit of a provision of the Constitution " 'or laws of the United States, another question, not Federal, " 'has been also raised and decided against such party, and the " 'decision of the latter question is sufficient, notwithstanding " 'the Federal question, to sustain the judgment, this court " 'will not review the judgment.' See also Wade v. Lawder, "165 U. S. 624."

Harrison v. Morton, 171 U. S., 38.

"We have repeatedly held that even the decision by the "state court of a Federal question will not sustain the juris-

"diction of this court, if another question, not Federal, were "also raised and decided against the plaintiff in error, and the "decision thereof be sufficient, notwithstanding the Federal "question, to sustain the judgment."

McQuade v. Trenton, 172 U. S., 636.

"It has been frequently held that the contention, even if "formally made, that the plaintiffs in error were seeking to "avail themselves of some right or immunity under the Consti- "tution or laws of the United States does not give us jurisdic- "tion to review the judgment of the Supreme Court of a State "where that judgment was based upon a doctrine of general "law sufficient of itself to determine the case. Beaupre v. "Noyes, 138 U. S., 397; Eustis v. Bolles, 150 U. S., 361; "Pierce v. Somerset Railway, 171 U. S., 641; Remington Pa- "per Co. v. Watson, 173 U. S., 443."

Seeberger v. McCormick, 175 U. S., 274.

The estoppel was a sufficient ground on which to base the judgment and was entirely non-Federal in its character. If the Society was estopped to deny the community character of the property then the Kansas decree of divorce was not material to the case.

It has been decided in many cases in this court that estoppel is a good and sufficient ground in such cases on which to support a judgment.

In *Moran v. Horsky*, 178 U. S., 205, it was held that

the defense of laches was an independent non-Federal question, broad enough to sustain the judgment of the state court and the writ of error was dismissed.

In *Speed v. McCarthy*, 181 U. S., 269, it was held that when the state court decided that defendants were estopped to set up a certain claim, then a Federal question could not be raised in this court on that claim.

In *Adams County v. Burlington & Missouri Railroad Co.*, 112 U. S., 123, the state court did not discuss the Federal question, but only the question of estoppel and this court said:

"Then, as to the cross bill, it finds the legal title to be in "the company, and that the county is estopped from claiming "the lands, or denying the company's title thereto. This of "itself implies that there was in fact no decision against any "right, title, privilege, or immunity claimed under the Consti- "tution or laws of the United States, and that the decree rested "alone on the defense of estoppel, which was broad enough to "control the rights of the parties without disposing of the "federal question which it was attempted to raise. In other "words, it was adjudged by the State court that the title of "the company must prevail in this suit because the county was "precluded by its conduct from insisting to the contrary."

In *Pierce v. Somerset Railway*, 171 U. S., 641, the writ of error was dismissed on this ground, the court saying:

"It is thus seen that there were two questions determined

"by the state court: One related to the validity of the statutes "passed subsequently to the execution of the mortgage, the "court holding them valid, and that they did not impair the "obligation of the contract contained in the mortgage. That "is a Federal question. The other related to the defense of "estoppel on account of laches and acquiescence, which is not "a Federal question. Either is sufficient upon which to base "and sustain the judgment of the state court. In such case a "writ of error to the state court cannot be sustained. Eustis "v. Bolles, 150 U. S., 361; Rutland Railroad v. Central Ver- "mont Railroad, 159 U. S., 630; Seneca Nation v. Christy, 162 "U. S., 283."

And also in *Hale v. Lewis*, 181 U. S., 473:

"It is clear that the Supreme Court disposed of the case "upon non-Federal ground broad enough to support the judg- "ment. It held, in substance, that, conceding the law to be "unconstitutional, the corporation is estopped to set up its "invalidity, by the action of the board of directors in deposit- "ing securities with the state treasurer under the Wisconsin "statute."

And we ask especial attention to the case of *Lowry v. Silver City Gold and Silver Mining Co.*, 179 U. S., 196. In that case the state court took up and discussed for several pages the Federal question, and decided it against the plaintiff in error, and then at the close of the opinion, in four or five lines it held the plaintiff was also estopped. (19 *Utah*, 334.) Just as in our case, where the court below discussed what might have been a Federal question, and after deciding that question

against plaintiff in error, held that plaintiff in error was, in any case, estopped to claim that the children had no title in the property. This court said:

"The Supreme Court of the State placed its decisions upon "two grounds: First, that although the Evening Star claim "included the original discovery shaft of the Wheeler claim, it "did not thereby destroy that claim in view of the fact that long "prior to the location of the Evening Star the owners of the "Wheeler had located a new shaft and developed the mine in "that shaft. Gwillim v. Donnellan, 115 U. S., 45, was held "not applicable. The other ground was estoppel by virtue "of the lease under which two of the plaintiffs in error acquired "possession. While the former ground is the one principally "discussed in the opinion, the latter was adverted to in a few "words at its close. The latter is sufficient to dispose of the "case in this court. Eustis v. Bolles, 150 U. S., 361. See also "DeLamar's Nevada Gold Mining Company v. Nesbitt, 177 "U. S., 523, and cases cited in the opinion. The writ of error "is dismissed."

Lowry v. Silver City Gold and Silver Mining Co., 179 U. S. 196.

We respectfully submit that the facts of this case bring it within the principles above set forth and that the writ of error should be dismissed.

If this court should decide that there is sufficient color of a Federal question to sustain its jurisdiction, we have added a motion to affirm on the grounds that the question on which

the jurisdiction depends is so frivolous as not to need further argument and that it is manifest the writ was taken for delay only.

MOTION TO AFFIRM.

I. THE QUESTION IS SO FRIVOLOUS THAT IT NEEDS NO FURTHER ARGUMENT.

It is claimed that the Supreme Court of the State of Washington did not give full faith and credit to the decree of divorce rendered by the Kansas Court.

This decree was entitled to the same effect in Washington that it would have had in Kansas and no more.

As was said in *Hancock National Bank v. Farnum*, 176 U. S., 640, in which case a Kansas judgment had been denied validity in the suit in Rhode Island:

"The Constitution declares that full faith and credit shall "be given in each State to the public acts, records, and judicial "proceedings of every other State, and that Congress may not "only prescribe the mode of authentication, but also the effect "thereof. Section 905 prescribes such mode, and adds that the " 'records and judicial proceedings, so authenticated, shall have " 'such faith and credit given to them in every court within the " 'United States as they have by law or usage in the courts of " 'the State from which they are taken.' Such is the Con- "gressional declaration of the effect to be given to the records "and judicial proceedings of one State in the courts of every

"other State. In other words, the local effect must be recog-
"nized everywhere through the United States.

"What, then, is the faith and credit given by law or usage
"in the courts of Kansas to a judgment against a corporation?
"What is the effect of such a judgment as there established?
"This is a question not answered by referring to general prin-
"ciples of law, by determining what at common law was the
"significance and effect of a judgment, but can be answered
"only by an examination of the decisions of the courts of
"Kansas."

And the rule that a judgment is entitled to only the same faith and credit that it would have in its own state has been the law at least since Congress in 1789 so declared. There has never been any doubt on that question.

How far then was this divorce decree rendered by the Kansas court in Tull v. Tull conclusive, and for what matters could it be collaterally assailed? We find our answer in the Kansas decisions which have been uniform on this question from the beginning.

In *Litowich v. Litowich*, 19 Kan., 455, (Jan. 1878), it was held that a Utah decree of divorce was void for lack of jurisdiction; that it could be collaterally attacked and shown to be void by evidence *dehors* the record, the court saying:

"And indeed, any judgment from a sister State, void for
"want of jurisdiction, may be shown to be void in any pro-
"ceeding, direct or collateral, and by evidence *dehors* the record,
"provided that the record itself does not show the invalidity

"of the judgment upon its face. Thompson v. Whitman, 18 "Wall., 457; Knowles v. Gaslight Co., 19 Wall., 58; Rape v. "Heaton, 9 Wis., 328, 332; Price v. Ward, 25 N. J. L. (1 "Dutch), 225; Aldrich v. Kinney, 4 Conn., 380; Starbuck v. "Murray, 5 Wend., 148, 153; Shumway v. Stillman, 6 Wend., "447, 452; Hall v. Williams, 6 Pick., 232, 237; Carleton v. "Bickford, 13 Gray, 591; Pollard v. Baldwin, 22 Iowa, 328; "Norwood v. Cobb, 15 Texas, 500; same case, 24 Texas, 551."

And again, in *Thorn v. Salmonson*, 37 Kan., 441, the court said:

"A foreign judgment rendered without jurisdiction may "be assailed in either a direct or collateral proceeding. Al- "though the recitals contained in the judgment that service "was made, raise a strong presumption in favor of the jurisdic- "tion and of the truth of the recitals, yet the plaintiff may show "by extrinsic evidence, if she can, that no service was actually "made. Strong proof will be required to overthrow the pre- "sumption of jurisdiction raised by the recitals; but if it is "clearly shown that the plaintiff was not served with process, "and did not voluntarily appear or submit to the jurisdiction "of the court, the recitals are of no value. Litowich v. Lito- "wich, 19 Kan., 451, and cases cited; Mastin v. Gray, Id., 458; "Pollard v. Baldwin, 22 Iowa, 328; Lazier v. Westcott, 26 "N. Y., 26 N. Y., 146; Freem. Judgm., 588 *et seq.*"

And in *Larimer v. Knoyle*, 43 Kan., 338:

"It is well settled in this State that a judgment rendered "without jurisdiction is void, absolutely and entirely, and may

"be shown to be void in a collateral as well as in a direct pro-"ceeding, and by extrinsic evidence as well as by the record "itself, and a judgment rendered against a party who has not "been served in any manner with summons or notice, and who "has not made any appearance in the case, is a judgment ren-"dered without jurisdiction. Mastin v. Gray, 19 Kan., 458; "Litowich v. Litowich, Id., 451; Amsbaugh v. Bank, 33 Kan., "100, 5 Pac. Rep., 384; Thorn v. Salmonson, 37 Kan., 441, "15 Pac. Rep., 588."

And in *Chicago R. I. & Pac. R. R. Co. v. Campbell,* 58 Kan., 818, 51 Pac. Rep., 1100, in which a judgment of Iowa was under consideration:

"The contention is that the court below did not give that "faith and credit to the proceedings of the courts of Iowa which "is guaranteed to the plaintiff by the provisions of the Consti-"tution of the United States and the Acts of Congress in pursu-"ance thereof. Where a party relies upon the proceedings or "judgment of the courts of one State as a cause of action or "ground or defense, the question of jurisdiction is always open. "The Supreme Court of the United States has so decided in "Pennoyer v. Neff, 95 U. S., 714; St. Clair v. Cox, 106 U. S., "350, 1 Sup. Ct., 354; Thompson v. Whitman, 18 Wall., 457; "Board of Public Works v. Columbia College, 17 Wall., 521."

And the last decision by that court on that subject that we have found is *Abercrombie v. Abercrombie* (Jan., 1902), 67 Pacific Reporter, 539, where the judgment of a sister State was under consideration, and it was said:

"The fact that the judgment sued on in this case is the "judgment of a sister State can make no difference. It is only "when jurisdiction is admitted that full faith and credit should "be given to the judgments of a sister State. That the judg- "ment of a sister State may be attacked collaterally on the "ground that jurisdiction was obtained fraudulently is sup- "ported by many authorities. * * * It is now perfectly "well settled that the judgment of a court without jurisdic- "tion of both the subject matter and of the person is absolutely "void. It is, in legal effect, no judgment. No rights can be "acquired under it, and no rights divested by it. Whenever "such a judgment is relied upon for any purpose or in any way, "the fact of the existence of jurisdiction may be inquired into. "The only serious question that has arisen of late years upon "this matter is as to whether the judgment could be collaterally "inquired into, as to the jurisdiction of the person, when it "recites on its fact that there was service of process or per- "sonal appearance. But now even that question is practically "at rest."

There has never been any doubt as to what the law was in Kansas on that question.

The State court of Washington considered the evidence offered with regard to the Kansas decree of divorce and found that decree to be void, for the following reasons: That the decree was obtained by fraud; that the plaintiff was not a resident of Kansas, as required by the laws of Kansas, at the time he filed the suit or thereafter; that no service, according to the laws of Kansas, was had on the defendant; and that the

pretended appearance by attorney for her was unauthorized, fraudulent and void.

And that these are the findings of the State Supreme Court is stated by plaintiff in error in its assignments of error. (Record, p. 587-589.)

All these defenses to the decree could have been raised in any court in Kansas. So that the same faith and credit was given the Kansas decree as would have been given it in the Kansas courts and the constitutional mandate has been complied with.

It is true that the plaintiff in error contends, and it is really its only contention, that the State court erred in its findings of fact. But those findings are conclusive on this court and cannot be re-examined for any purpose.

As was said by this court in *Egan v. Hart*, 165 U. S. 188:

"On error, however, to a State court, this court cannot "re-examine the evidence, and, when the facts are found below, "is concluded by such finding. Dower v. Richards, 151 U. S., "658; Bartlett v. Lockwood, 160 U. S., 357; Stanley v. "Schwalby, 162 U. S., 255, 278. True, it is that in Dower "v. Richards the court (referring to the dictum in Republican "River Bridge Co. v. Kansas Pacific Railway, 92 U. S., 315, "317), treated as open for further consideration the question "whether, in chancery cases, the power existed in this court to "review the decision of state courts on both the law and the "fact. We, however, conclude that not only the very nature

"of a writ of error, but also the rulings of this court from the "beginning, make it clear that on error to a State court in a "chancery case, as in a case at law, when the facts are found "by the court below, this court is concluded by such findings. "The adjudications are collected very fully in Dower v. Rich- "ards and in the subsequent cases above referred to."

And this has been repeatedly reaffirmed; see

Hedrick v. A. T. & S. F. Ry. Co., 167 U. S., 673.
Atchison T. & S. F. Ry. Co. v. Matthews, 174 U. S., 96.
Whitney v. United States, 181 U. S., 104.
Eastern B. & L. Assn. v. Ebaugh, 185 U. S., 114.
Jenkins v. Neff, 185 U. S., 230.
Bement v. National Harrow Co., 185 U. S., 70.

It would seem that there could be no room for argument on any of these questions. The findings of the state court are conclusive that the Kansas court did not have jurisdiction to render the decree of divorce. The Kansas courts have always held that this could be shown against a decree of a Kansas or other court. And this court has always held that a judgment was not entitled to greater faith and credit away from home than it would receive at home.

This would certainly seem to be one of those cases where as is said in *Equitable Life Assurance Society v. Brown*, 23 Sup. Ct. Rep. 123: "It is evident on the face of the record "that the question on the merits is not open to possible conten- "tion becaue it has previously been so specifically and adversely "ruled on by this court as to absolutely foreclose further con- "tention on the subject."

The 10th assignment of error is not based on anything that appears in the record, so cannot be considered.

The question raised by the 11th assignment of error that the decree was too broad for the pleadings, was discussed by counsel in their briefs and by the state court (Record pp. 551-553) and decided against plaintiff in error. This is not a Federal question and hence will not be considered by this court.

The rule in such cases was clearly stated by Mr. Chief Justice Waite in *McLaughlin v. Fowler*, 154 U. S., 663.

"We can only look beyond the Federal question when that "has been decided erroneously, and then only to see whether "there are any other matters or issues adjudged by the state "court sufficiently broad to maintain the judgment, nothwith-"standing the error in the decision of the Federal question. "Murdock v. City of Memphis, 20 Wall., 590."

And it is too well settled to need citation of authorities that a person is not deprived of his property without due process of law, when he has had his day in court on the question involved, when, as in this case, the question of what decree could be given under the pleadings was discussed by counsel, and discussed at length by the court when it decided the case and the question against plaintiff in error.

The other eight assignments of error are against the findings by the state court, and as we have seen above, those findings cannot be re-examined by this court.

There is no real Federal question in any of those assign-

ments, but it is such a case as this court has held should be affirmed without further delay or argument. In *Wilson v. North Carolina*, 169 U. S., 586, it is said:

"Upon the case made by the plaintiff in error, the Federal "question which he attempts to raise is so unfounded in sub- "stance that we are justified in saying that it does not really "exist; that there is no fair color for claiming that his rights "under the Federal Constitution have been violated, either by "depriving him of his property without due process of law or "by denying him the equal protection of the laws.

"In Hamblin v. Western Land Company, 147 U. S., 531, "it was stated that 'a real, and not a fictitious, Federal question " 'is essential to the jurisdiction of this court over the judg- " 'ments of state courts. Millingar v. Hartupee, 6 Wall., 258; " 'New Orleans v. New Orleans Water Works Co., 142 U. S., " '79, 87. In the latter case it was said that 'the bare averment " 'of a Federal question is not in all cases sufficient. It must " 'not be wholly without foundation. There must be at least " 'color of ground for such averment, otherwise a Federal ques- " 'tion might be set up in almost any case, and the jurisdiction " 'of this court invoked simply for the purpose of delay.' "

The Federal question relied on is devoid of any substantial foundation or merit, just as in *New Orleans Water Works Co. v. Louisiana*, 185 U. S., 336, where it was said:

"It has long been the holding of this court that in order to "warrant the exercise of jurisdiction over the judgments of "state courts there must be something more than a mere claim

"that a Federal question exists. There must, in addition to the "simple setting up of the claim, be some color therefor, or, in "other words, the claim must be of such a character that its "mere mention does not show it destitute of merit; there must "be some fair ground for asserting its existence, and, in the "absence thereof, a writ of error will be dismissed, although the "claim of a Federal question was plainly set up. Thus, in Mil- "lingar v. Hartupee, 6 Wall., 258, the Chief Justice (at page "261), said: 'Something more than a bare assertion of such "'an authority seems essential to the jurisdiction of this court. "'The authority intended by the act is one having a real exist- "'ence, derived from competent governmental power.' This "case arose under the 25th section upon the assertion that the "validity of an authority exercised under the United States "was drawn in question, and the decision was against its "validity. It was held not sufficient to make the claim, but "there must be some color of foundation for its assertion."

And the question of the necessity of a substantial claim was fully reviewed by this court in the late case of *Equitable Life Assurance Society v. Brown* (Dec., 1902), 23 Sup. Ct. Rep., 123:

"From the analysis just made, it results that although a "Federal question was raised below in a formal manner, that "question, when examined with reference to the averments of "fact upon which it was made to depend, is one which has been "so explicitly decided by this court as to foreclose further argu- "ment on the subject, and hence to cause the Federal question "relied upon to be devoid of any substantial foundation or

"merit. This being so, the case, is brought directly within the "rule announced in New Orleans Water Works Co. v. Louisi- "ana, 185 U. S., 336, 345, 46 L. ed. 936, 941, 22 Sup. Ct. Rep., "691, and authorities there cited. It is likewise also apparent "from the analysis previously made that even if the formal "raising of a Federal question was alone considered on the "motion to dismiss, and therefore the unsubstantial nature of "the Federal question for the purposes of the motion to dismiss "were to be put out of view, the judgment below would have "to be affirmed. This follows, since it is plain that as the sub- "stantiality of the claim of Federal right is the matter upon "which the merits depend, and that claim being without any "substantial foundation, the motion to affirm would have to "be granted under the rule announced in Chanute v. Trader, "132 U. S., 210, 33 L. ed. 345, 10 Sup. Ct. Rep., 67; Richard- "son v. Louisville & N. R. Co., 169 U. S,, 128, 42 L. ed. 687, "18 Sup. Ct. Rep., 268, and Blythe v. Hinckley, 180 U. S., 338, "45 L. ed. 561, 21 Sup. Ct. Rep., 390."

We believe that an examination of the record in this cause shows that the plaintiff in error is not concerned so much about any possible Federal question, but about the findings of the court below on the facts; that the alleged Federal question is raised not for any intrinsic value it may possess, but in order to provide a peg on which may be hung the objections to the findings of fact made by that court. A reading of the errors assigned for this writ shows, we believe, the truth of this statement. It has seemed to us, with regard to this phase of the question, that the remarks of Mr. Justice Brewer in the late

case of *Beals v. Cone et al.* (decided January 26, 1903, not yet reported), are particularly apposite to the case in hand:

"Indeed, while this case has evidently been hotly contested, "yet the matters which were subjects of controversy and de- "termination were questions of fact concerning the time, extent "and effect of the alleged discoveries of mineral, and "also alleged wrongs in respect to the jury. To "those matters, and those alone, was the attention of "the parties and the courts directed. Counsel for "plaintiff in error has filed an elaborate brief of 249 printed "pages, which is able and exhaustive, both on questions of min- "ing law and the conduct of the trial. One cannot, however, "fail to be impressed, after a perusal thereof, with the fact of "a failure to recognize that there is no general right to a writ "of error from this court to the courts of a state; that there is "but a special right, a right to bring such cases, and such cases "only, as disclose a Federal question distinctly ruled adversely "to the plaintiff in error. We fail to see that any title, right, "privilege or immunity of a Federal nature was specially set "up and claimed. Very likely the construction and the effect of "Federal statutes were, in a general way discussed and consid- "ered, but nowhere do we find that special setting up or claim- "ing of a Federal right which justifies us in taking jurisdiction. "As we have stated, the validity of no Federal statute was de- "nied in the State courts. Neither did the plaintiff in error, "prior to the judgment of affirmance in the Supreme Court, "challenge the validity of any State statute on the ground of

"its repugnance to paramount Federal law. The writ of error "is dismissed."

2. That the writ is frivolous and was taken only for delay, and that the judgment should be affirmed with damages.

What was said by this court in *Blythe v. Hinckley*, 180 U. S., 333, seems very pertinent to our case:

"But the motion to affirm should be granted because the "assignments of error are frivolous and we are convinced the "writ was taken only for delay. This is the ground for the "decisions in Chanute City v. Trader, 132 U. S., 210, 214, and "Richardson v. Louisville & Nashville Railroad Co., 169 U. S., "128, 132. * * * The claim which the plaintiff in error "founds upon the section of the Federal Constitution is too "plainly without foundation to require further argument. The "right of the defendant in error to this property has been in "litigation for more than fifteen years, and many years after "courts of competent jurisdiction have decided all the questions "in her favor, and we think this writ of error, judging by the "character of the question sought to be raised under it has been "taken for delay only. The judgment must be affirmed."

Let us look a moment at the facts in this case. The property was taken from the children in 1887, and this suit to recover that property was begun by them six years ago, when two of them were of age. After a full trial in the lower court, an appeal was taken to the Supreme Court of the State of Washington, where all points were considered and the full relief asked for granted to the children. Thereafter a petition

for rehearing was filed by the Society and denied. In all the pleadings and all the proceedings in the lower court and in the Supreme Court, no hint or suggestion had been made that a Federal right was claimed or a Federal question raised. The plaintiff in error waited nineteen months after the decision by the Supreme Court, and then sought a writ of error from this court, giving eleven assignments of error. One of these is based on facts, no word of which is in the record. Eight are simply attacks on the findings by the Supreme Court, and the remaining two are, we believe, without the support of any decision which has ever been rendered by this court.

We believe this is just such a case as this court had in mind when it said in *Whitney v. Cook*, 99 U. S., 607:

"Our experience teaches that the only way to discourage "frivolous appeals and writs of error is by the use of our power "to award damages, and we think this a proper case in which "to say that hereafter more attention will be given to that sub- "ject, and the rule enforced both according to its letter and "spirit. Parties should not be subjected to the delay of pro- "ceedings for review in this court without reasonable cause, "and our power to make compensation to some extent for the "loss occasioned by an unwarranted delay ought not to be over- "looked.

And on the authority and precedents of

Kilbourne v. State Sav. Inst., 22 How. 503.

Hennessy v. Sheldon, 12 Wall., 440.

West Wisconsin R. Co., v. Foley, 94 U. S., 100.

Nelson v. Flint, 166 U. S., 276.

we respectfully ask that damages be granted to defendants in error for the injury caused by this frivolous writ.

Respectfully submitted,

WILLIAM M. MURRAY,

Guardian *ad litem* of Ernest B. Tull, a minor,

in propria persona.

FREDERICK W. DEWART,

Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 104.

THE GERMAN SAVINGS AND LOAN SOCIETY, PLAINTIFF IN ERROR,

vs.

DORA MAY DORMITZER, WILLIAM L. TULL AND ERNEST B. TULL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR DEFENDANTS IN ERROR.

In replying to the brief filed by the plaintiffs in error, I ask leave to refer to the briefs of points, authorities and arguments heretofore submitted by the defendants in error and the minor defendant in error upon the motions to dismiss or affirm, and respectfully to insist upon the propositions laid down in those briefs.

FIRST.

The Divorce and Its Incidents.

The Society, in its pleadings, sets out the Kansas divorce and the laws of Kansas relative to property rights of the

wife after death of the husband, or divorce. It claims, in argument, that the husband brought the proceeds of the sale of the Kansas property into Washington and with them purchased this property, which thus became his separate property. But the contract of purchase was made in December, 1886. The divorce decree was not entered until May, 1887. It is necessary to hold that the effect of the Kansas divorce was to divest the wife of all claim to her husband's property in Washington, though acquired before the divorce.

> The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated.
>
> *United States* v. *Fox*, 94 U. S., 315 ;
> *Arndt* v. *Griggs*, 134 U. S., 316.

Van Cleaf *v.* Burns, 133 N. Y., 540, was a case in which the plaintiff sought to recover dower in certain lands, in the city of Brooklyn, of which her husband was seized during their marriage. The husband had obtained a divorce from the plaintiff in the State of Illinois upon the ground of her abandonment. As to the effect of the judgment upon the property rights of the wife, the Court said :

> This judgment is, therefore, conclusive evidence in this State that the parties were divorced as therein stated, and for the cause therein set forth. The effect which such a divorce has upon the lands of the husband in the State of Illinois must be determined by the

> law of Illinois. The effect which it has upon the lands of the husband within this State must be determined by the laws of this State. The sovereignty of Illinois cannot extend beyond its territory, and the legislature of that State has no power to enact what shall be the effect of a judgment of one of its own courts upon the real estate situated within another sovereignty. It has made no such attempt. As to this question, full faith and credit are given to the judgment of a court of a sister State when the same effect upon rights of property within the jurisdiction of that State is given to such a judgment as is given to it by the law of the State where rendered. The judgment is not open to any inquiry upon the merits.

The Society contends also, that apart from the divorce, the husband was the owner of the Kansas property, and that, therefore, the property purchased in Washington with its proceeds was his separate property.

In view of these independent contentions it is difficult to see how, under the circumstances of this case, the matter of full faith and credit to the Kansas decree as a Federal question is necessarily involved.

It is claimed that by the laws of Kansas the wife was obliged to join her husband in all conveyances of his real estate. The proofs show that conveyances for all of his property had thus been made before the application for divorce, and, therefore, upon this theory, her rights had been extinguished. The Washington Supreme Court says:

> The only proof offered as to the laws of Kansas is not as to the status of property during the continuance or existence of the community, but as to the effect of a dissolution by death or divorce. (Tr., 349.)

If the husband survive the wife and this construction of the law is correct, the rights of property are the same

whether the dissolution of the marriage was by death or divorce.

The supreme court of the State of Washington found as facts that the Kansas decree of divorce was procured by fraud; that Tull was not a resident of the State of Kansas at the time he filed his bill for divorce; that Lucy A. Tull was not a resident of the State at the time; that no service was had upon her in that State; that the pretended appearance of an attorney and the filing of the answer were unauthorized, without her knowledge, and fraudulent. (Tr., 343 to 349.)

Tull and his wife were married in 1872, at the residence of the wife's parents in Harrison county, Missouri. They lived together until January 1887, when the wife went to her father's home in Missouri. Tull had determined to break up his residence in Kansas, which was then the matrimonial domicil, and establish a new home in the West. He proceeded, with the knowledge and assistance of his wife, to convert this Kansas property into money for that purpose. The evidence clearly shows that her departure was on no other account. Tull filed his bill for divorce February, 25, 1887, in which he alleges that his wife had committed adultery with many persons whose true names were unknown, and specifying one case, but with a person unknown, in September, 1884.

On the same day summons was asked to issue to the Sheriff of Harrison County, Missouri. This writ does not appear to have been issued. An alias summons issued March 23, 1887, directed to Sacramento County, California. This latter summons was returned as served on April 2, 1887, but no proof of the service, as required by the statute, was made.

Tull himself, in testifying, states that he sold out his business in Kansas before 1887. He says (Tr., 77):

> Prior to December, 1886, I had sold out everything in Kansas. I sold out my business and started out to hunt a new location. I went to Southern California and up to San Francisco and around Seattle and Tacoma and Portland, and landed here and bought—made this purchase and located here. I decided to locate here and came back here as soon as I could get here. I went back to Kansas and wound up my affairs there preparing to come here as soon as I could get here.

There is much more of this testimony, which is referred to in the opinion of the Supreme Court of Washington and in the briefs of counsel in this Court. It is, therefore, clearly shown that long before the filing of the complaint in the divorce case Tull had closed out his business in Kansas, with the intention of removing therefrom. After various excursions he had determined to locate in Spokane, had purchased property there, made arrangements to improve it, and left Spokane with the intention of returning. He had also removed his family from Kansas. This record discloses that after the visit to Spokane in December, 1886, he never did return to Kansas except to settle up some necessary business. Upon these facts the Supreme Court of Washington decided that at the time of the filing of this complaint Tull had no domicil in the State of Kansas. There is a peculiarity in this case, distinguishing it from the cases, to which the court has been referred, of Andrews *v.* Andrews, Bell *v.* Bell, and Streitwolf *v.* Streitwolf. Here there was no endeavor upon the part of the plaintiff to obtain a domicil for the purposes of divorce. Here, having abandoned the domicil, it was deemed more convenient and less liable to detection to secure, upon fraudulent grounds, a divorce at the place of the former residence. The facts that the wife, without charge or suspicion, was quietly removed to her father's

home, her children accompanying her; that a bill for divorce on the ground of adultery was almost simultaneously presented; that process was sought to be had by publication; and that means were taken to prevent any knowledge to her, all show the fraud that was attempted to be perpetrated upon her.

The service in California, which is the only service claimed to have been had, was not in accordance with the statute. There is an exemplification of the record, which was given in evidence. That shows a certificate purporting to have been made by the sheriff in California, but fails to show what the statute required—an affidavit that service had been made.

It will be observed from the statute of Kansas, relating to divorce, introduced into evidence, that upon a decree against the wife the court shall also decree what her property rights shall be. The decree rendered in Kansas did not do this. It was a decree dissolving the bonds of matrimony—that and nothing more.

After Tull had established himself in Spokane and Mrs. Tull became advised of the existence of this divorce, she, with her children, proceeded there and immediately filed a bill in chancery to set aside the decree of divorce and be restored to her rights of property. In that bill she sets up that she and her husband had owned the Kansas property in community; that for the purpose of enabling him to make a new home for them she had consented to and had executed the conveyances necessary to enable him to settle the property. She denied all knowledge of the divorce, all of the allegations of the bill, all notice of the pendency of the suit, and made other and serious charges against him. It is only necessary for the purposes of this argument to say that this bill was filed on the 28th day of July, 1887, and that on the 30th day of July, two days after, the parties

entered into a stipulation that the suit should be dismissed. Immediately afterwards they were re-married. F. M. Tull testifies with regard to these matters (Tr., 205):

> "Q. After she came to Spokane, state whether or not there was a marriage ceremony performed between you and her, and, if so about when?
>
> "A. I do not know exactly—it was either the last of July or first of August, somewhere around there."

And page 206:

> "Q. Did you and Lucy A. Tull, previous to the performance of this last marriage ceremony, have a mutual agreement as to the status and condition of your property and your property rights, and if so, state what it was?
>
> "A. Well, we had an agreement; we settled up our back difficulties, and she agreed to withdraw the suit, and we remarried again."

And page 208:

> "Q. State fully, Mr. Tull, what the original agreement between you and her was?
>
> "A. Well, we simply agreed to fix up our past, our differences, and remarry, let her have the interest in the property as she had had. I say we agreed to remarry and she would withdraw the suit, and she should have an interest in the property, and there was no specific amount she should have, that she should have the interest in the property and settle up the business as man and wife, *and the property be together.* That was all there was to it."

These parties having come together, having composed their differences and agreed upon the relations which should thereafter exist between them, there were but two courses to be pursued: they could endeavor to set aside the disgraceful and fraudulent decree; or, avoiding scandal and morti-

fication, they could quietly remarry and reunite the broken threads of their lives. They chose the latter course. "We had an agreement; we settled up our back difficulties, and she agreed to withdraw the suit, and be remarried again." And into their agreement—into their reconciliation—entered the settlement of their respective interests in the property.

Mrs. Tull claimed, in the suit she brought, that the property in Kansas was the common earnings and accumulations of her husband and herself and was community property. Tull says the understanding was to "let her have the interest in the property as she had had; she should have an interest in the property, and there was no specific amount she should have, that she should have the interest in the property and settle up the business as man and wife, and the property be together."

The inquiry in this case is whether the property, at the time of the death of Mrs. Tull, was community property, or the separate property of the husband. The Washington Supreme Court held the presumptions were it was community property in Kansas:

> "In the absence of proofs of the laws of another State in relation to the property rights of husband and wife as to property acquired there during marriage, it has been held that they will be presumed to be the same as those of the State where the proceeds of such property have been re-invested. *Marsters* v. *Lash*, 61 Cal., 622; *Shumway* v. *Leakey*, 67 Cal., 458; *Mortimer* v. *Marder*, 93 Cal., 172. This court has held that under the statutes of this State lands acquired after marriage by a deed of purchase expressing a money consideration are presumed to be community property, and the presumption can be rebutted only by clear and convincing proof that the consideration was furnished out of the grantee's separate property. *Yesler* v. *Hochstettler*, 4 Wash., 349.

"From the view we take of the case it is not necessary to further discuss the subject of presumptions. But it seems, even from the laws introduced in evidence by respondent, that dower and curtesy are abolished in Kansas and one-half of the real estate, after paying debts, on the death of one spouse passes to the other, thus showing that the common law is no longer in force in this respect at least; and, if anything is to be presumed, these facts might warrant the presumption that Kansas had a system somewhat similar to our own." (Tr., pp. 349–350.)

Now, conceding for the purposes of this argument, that the Kansas divorce was valid, what effect did this reconciliation, agreement and remarriage have upon the property rights of the wife? It is not at all necessary there should be a code or a statute for the existence of an estate in community. It may be created by contract, by consent. It is not known in the Digest, and yet community property is familiar in the civil law. It has its origin in the Spanish law. Under that law adultery of the wife was punished by the loss of her ganancial property and by secluding her in a convent. But if there was a reconciliation and a pardon by the husband, she was restored to his house and to her property rights.

Partida 7 a, tit. XVII, ley 15 (translated):

"If the husband should desire to pardon her after this, he may do so within two years; and if he should pardon the error, she may withdraw from the monastery and return to his house; and if he should receive her so, we say that the portion the husband settles on the wife and the other things which they have jointly ought to be restored to that condition in which they were before the adultery had been committed."

(Codigo Civil, Scævola, vol. 2, p. 216.)

"One of the consequences of adultery by the wife seems always to have been the loss of her share of the ganancial property (quoting authorities). This, however, she might regain if her husband was reconciled to her within two years, but if he did not forgive her, or if he died before the lapse of two years, then she was confined to the monastery for life."

Wheat v. *Ogden*, 15 Tex., 241, 246.

Of course, divorces were unknown to that law. But the re-marriage opens the door of restoration as did the reconciliation. The property rights are regained. If it were attempted to enforce as harsh a doctrine as that the divorce deprived the wife of property rights and so finally dissolved the matrimonial compact that they could not be restored, then the principle could be established by a mutual agreement. And this would be in no sense, as suggested, the creation of an estate.

In the case before us all this was so. There were no rights obtained by the society in reliance upon the decree. None of the transactions of loan was entertained until after the re-marriage, and the establishment, in the way we have mentioned, of the community in all the property.

SECOND.

The Estoppel.

The Supreme Court of Washington decided that the society was estopped from disputing the title of the defendants in error. That court said (Tr., 578):

> When Lucy A. Tull died respondent refused to go on with the loan until the interest of the children was transferred to the father. F. M. Tull and the respondent dealt with the property as a whole on the basis that the children had a one-half interest therein. F. M. Tull and Lucy A. Tull had agreed as to the status of

the property before her death, and this status was recognized by the respondent; but the presumption that it was community property not having been overthrown it is not necessary to further comment on the effect and character of this estoppel.

The Supreme Court goes on at great length to examine the testimony as to the inception and character of the loans. The proposition for the first loan was made in the lifetime of Mrs. Tull. Before the transaction was completed Mrs. Tull died. The parties representing the Society refused to go on with the loan unless F. M. Tull could show a clear title to the property and unless the children's interest was disposed of. P. D. Tull, the uncle of these children, filed a petition to be appointed as guardian, upon which F. M. Tull, their father, endorsed the request that he be so appointed. The appointment was made and F. M. Tull became one of the sureties upon his bond. Applications were made for the sale of the property of the minors and F. M. Tull became the purchaser. In all these proceedings it was stated that the minors were entitled to a one-half interest in this property as heirs of their mother. Clearly Tull and those in privity to him were estopped by record from denying the title of these children.

The court found that the probate proceedings were for the purpose of vesting the title to the entire piece of property in the father so that he might mortgage it to the respondents in order to get money to go on with the buildings then in course of construction. Guardian deeds then having been made to F. M. Tull, he became the owner of the entire interest, these deeds reciting all the probate proceedings. This being made satisfactory to the Society, the loans were effected. The Supreme Court holds that they were bound by actual notice of the one-half interest of the children in this property, or at least were put upon inquiry

which should be had by any person who was prudent or not guilty of gross negligence. To repeat the facts as found by the Supreme Court of Washington: After the death of Mrs. Tull the Society refused to go on with the loan until her estate was probated and the rights of her children as her heirs adjudicated; all the parties concerned and their counsel treated the property as community property and deemed it necessary to divest the title and transfer it to the father, F. M. Tull; the probate court determined the facts as to the one-half interest of the children and the one-half interest in the father; F. M. Tull became the purchaser at the sale and thereby owner of the whole estate and thereupon the Society made the loans and took the first mortgages from F. M. Tull. The court determined that the Society was estopped from asserting that the property was not community estate and that these defendants in error did not inherit an undivided one-half as heirs of their mother.

What may have been the motive of the Society in its conduct and acts in negotiating the loans need not be enquired into here. The court did not fasten its determination of the estoppel upon the presumptions of community property. It was an independent determination. There was no intimation that the children had no original right to the property. On the contrary, the court held they had, and that this was affirmed and recognized by the Society.

ROBERT A. HOWARD,
LUCIUS G. NASH,
Counsel for Defendants in Error.

Supreme Court of the United States.

No. 104.—October Term, 1903.

The German Savings and Loan Society, Plaintiff in Error, vs. Dora May Dormitzer, William L. Tull and Ernest B. Tull. } In error to the Supreme Court of the State of Washington.

[January 4, 1904.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a writ of error to the Supreme Court of Washington on the ground that full faith and credit has not been given to a decree of divorce rendered in the State of Kansas. (See 23 Wash. 132.) The record is long, but all that is material to the case in this court can be stated in a few words. The defendants in error are the children of one F. M. Tull, and brought a complaint for the purpose, so far as the Savings Society, the plaintiff in error, is concerned, of establishing their right to an undivided share in certain land in Spokane, Washington, to which the Savings Society claims an absolute title. At least that form of relief was held to be open under their complaint. Their claim was made on the ground that the land was community property of their parents and that they inherited an undivided share upon their mother's death. The Savings Society claimed under the foreclosure of a mortgage executed by F. M. Tull. Before the execution of their mortgage and after Tull had applied for a loan his wife died, and probate proceedings were instituted under which Tull purported to purchase his children's interest as a preliminary to making the mortgage. It has been decided that these probate proceedings were void as against a purchaser with notice and that the Savings Society took with notice. These are local matters with which we have no concern. But the Savings Society contended that it had a good title, irrespective of these proceedings. The land was purchased with the proceeds of Kansas property which seems to have stood in the name of F. M. Tull. Tull procured a divorce in Kansas, and if that divorce was valid his wife's interest in his property was gone. Therefore, it is said, the land in Washington followed the character of the purchase money as his separate property, although before the payment was completed the divorced parties made up their differences and were married to each other a second time.

The Supreme Court of Washington, trying the case *de novo*, found that Tull had changed his domicil from Kansas to Washington before begin-

ning his divorce proceedings, and therefore that the decree was without jurisdiction and void. It further found on evidence satisfactory to itself that, the divorce being out of the way, the property was joint or community property, and that his children had the right they claimed. With this last again we are not concerned, and the only question for us is whether the court could go behind the record of the Kansas case.

There is a motion to dismiss. It is said that the Federal question was not set up in the court below, and that the court put its decision on two distinct grounds, one of which was that the Society was estopped to deny the children's title. The latter ground, it is said, was independent of the Federal question. But the opinion of the court deals expressly with the constitutional rights of the Savings Society, and the Society seems to have insisted on those rights as soon as the divorce was attacked. *Tullock* v. *Mulvane*, 184 U. S. 497, 503, 504. As to the other point, it is at least doubtful whether the court meant to find any estoppel except on the footing that the property was shown to be community property. The motion to dismiss is overruled. See *Johnson* v. *Risk*, 137 U. S. 300, 307.

On the merits, however, the plaintiff in error has no case. It is suggested that the invalidity of the judgment for want of jurisdiction was not put in issue in the pleadings. It is a sufficient answer that the Supreme Court of the State treated it as in issue. *Hill* v. *Mendenhall*, 21 Wall. 453, relied on by the plaintiff in error, came from the Circuit Court of the United States, and when a case properly is brought here from the Circuit Court upon constitutional grounds the whole case is open. *Horner* v. *United States*, 143 U. S. 570. But it is otherwise when a case comes, as this does, from a State court. *Osborne* v. *Florida*, 164 U. S. 650, 656; *McLaughlin* v. *Fowler*, 154 U. S. 663; *Murdock* v. *Memphis*, 20 Wall. 590.

It is too late now to deny the right collaterally to impeach a decree of divorce made in another State, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction and the appearance of the other party. *Andrews* v. *Andrews*, 188 U. S. 14, 39; *S. C.*, 176 Mass. 92, 93. An attempt was made to avoid the authority of *Andrews* v. *Andrews* by the suggestion that there the respondent in the divorce suit had disappeared before the decree. But a respondent cannot defeat jurisdiction by disappearing. Indeed in strictness only the attorney disappeared, and the respondent simply ceased to defend the suit. The effect given to the statute of Massachusetts in that case depended wholly on contradicting the record of the divorce suit and proving the want of jurisdiction by proving the libellant's want of domicil in the State.

It very well may be that, if the Supreme Court of Washington had undertaken to deny the jurisdiction of the Kansas tribunal without evidence impeaching it, such an evasion of the Constitution would not be upheld. It may be that in fact some circumstances were adverted to by

that court which hardly warranted an inference. But it had before it the testimony of the husband, Tull, from which it appeared that before he made the contract for a part of the land in question he had sold out his property and business in Kansas and had gone in search of what he called a new location, and that when he bought this land he decided to locate there. The land, it will be remembered, is in Spokane, Washington. Tull was there when the contract was made, and therefore there was ground for the court to find that at that moment he changed his domicil to Spokane. The contract was made on December 28, 1886, and the libel for divorce in Kansas was not filed until February 25, 1887. There was evidence warranting the finding, and that being so we take the facts as they were found. *Egan* v. *Hart*, 165 U. S. 188.

Decree affirmed.

Mr. Justice McKenna dissents.

True copy.

Test:

Clerk Supreme Court, U. S.